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92-1100

No.

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

JEROME J. NORTON,

*Petitioner,*

*vs.*

RICHARD ROSEN AND SUSAN ROSEN and THE UNITED STATES OF AMERICA,

*Respondents.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether Congress intended "interest" payable by delinquent taxpayers in addition to the purchase price under 26 U.S.C. § 6337 should be payable from the date of sale, or from the date of purchase payments on account of the tax sale purchase? (2) Where the redemption amount is in dispute, can the redeemer demand the immediate surrender of the Certificate of Sale and thus demand the surrender of the tax purchasers right to the opinion and judgment of a court of law as a condition to tender?

## PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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No.

In The

# Supreme Court of the United States

October Term, 1992

JEROME J. NORTON,

*Petitioner,*

*vs.*

RICHARD ROSEN AND SUSAN ROSEN and THE UNITED STATES OF AMERICA,

*Respondents.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

The petitioner, Jerome J. Norton, respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding July 23, 1992 and the judgment of the United States District Court, Eastern District of New York entered November 18, 1992 pursuant thereto.

## OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a) is reported at 970 F.2d 1079. The opinions and judgment of the District Court, which are not officially reported, appear in the Appendix hereto at 9a.

## STATEMENT OF JURISDICTION

The order of the Court of Appeals (App., *infra*, 1a) was entered on July 23, 1992. A timely petition for rehearing and suggestion for a rehearing en banc was denied on September 23, 1992 (App., *infra*, 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

## STATUTES INVOLVED

The relevant portions of §§ 6335, 6337, 6338, 6340, 6343 and 6622 of the Internal Revenue Code of 1954, as amended (in effect on April 2, 1986), are set out in a statutory appendix (App., *infra*, 60a).[1]

## STATEMENT OF THE CASE

Because of non-payment of income taxes, the I.R.S. acquired three (3) tax liens on the condominium of Richard and Susan Rosen: (a) 1982 in the amount of $156,446.34; (b) 1985 in the amount of $37,558.64; (c) 1986 in the amount of $11,603.62. On April 2, 1986, the I.R.S. sold the 1982 tax lien to Jerome J. Norton for the sum of $137,500.00. Norton paid the purchase price in three installments during the next thirty days as permitted by 26 U.S.C. § 6335(e)(2)(D). On September 29, 1986, the last day for

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1. Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended (the Code or I.R.C.).

redemption, the Rosens offered Norton a check in the sum of $151,250.00 on condition that Norton deliver to them the Certificate of Sale which he had received from the I.R.S. evidencing his purchase of the tax lien. The amount offered by Rosens represented the $137,500.00 paid by Norton plus twenty percent interest compounded annually on the purchase price from the date of sale (April 2, 1986). The offer was declined by Norton (after which the Rosens' agents both said "thank you" and left the meeting) because: (a) the amount offered was insufficient (§ 6622 required interest to be compounded on a daily basis and not an annual basis); and (b) the offer of payment was conditional upon Norton's simultaneous delivery to Rosens of the Certificate of Sale evidencing his purchase of the Rosen's tax lien (which delivery would prevent Norton from contesting and collecting the difference between the amount tendered by the Rosens and the amount which Norton believed was due him. Additionally, the tender was in the form of a check, payment of which could be "stopped" before Norton collected the proceeds ).

The Rosens filed this action in October 1986 seeking to compel Norton to accept the tender. The United States of America remains a party for the purpose of issuing a deed to Norton. In 1987, then-District Judge (now Circuit Court Judge) McLaughlin, in denying summary judgment, concluded that the tender was deficient because of the Rosens' use of an annual compounding rate, rather than the daily calculation required by § 6622 and, that if conditionally tendered, constituted an improper tender. The case proceeded, based on the assumption that the tender was deficient. Roughly four years later, the District Court (David F. Jordan, Magistrate Judge), entered judgment awarding title to Norton and dismissing the Rosens' complaint. On February 14, 1992, the District Court amended the judgment. It confirmed the award of title to Norton, and, because the Rosens had retained possession and use of the property by obtaining an injunction, *pendente lite*, awarded Norton use and occupancy for the period the litigation had been pending.

The Circuit Court reversed, holding that while the District Court was correct in its conclusion that interest was to be compounded daily, the District Court had erred by calculating daily interest on the entire purchase price from the date of sale (April 2, 1986), instead of from the date each installment payment to the I.R.S. during the month following the sale and that the Rosens' demand for delivery of the Certificate of Sale as *quid pro quo* for a check in the amount tendered was proper.

## JURISDICTIONAL BASIS OF ACTION IN THE DISTRICT COURT

This action was brought pursuant to Title 26 of the Internal Revenue Code of 1954, as amended, § 6337(b). The Answer was amended pursuant to Stipulation dated February 26, 1987, and Order dated August 20, 1987, so as to include a Counterclaim against the Rosens and a Cross-claim against the defendants, United States of America and John J. Jennings, District Director for the Internal Revenue Service, pursuant to § 6338. The District Court had subject matter jurisdiction to hear this case under 28 U.S.C. § 1340 and 28 U.S.C. §§ 1331, 1361 and 5 U.S.C. § 702.

## REASONS FOR GRANTING THE WRIT

The Court of Appeals, in this case has decided two important questions of federal tax law, the first in a way that conflicts with a decision of the Supreme Court of the State of New Jersey; the second in a way that conflicts with decisions of the 8th Circuit and this Court. The decision in the Circuit Court is erroneous, has significant administrative importance and involves significant amounts of revenues, for the I.R.S. seizes and sells many properties each year, and similarly situated delinquent taxpayers should be subject to the same remedies of tax collection prescribed by Congress without regard to their state of residence. The

disparity in treatment created by the decision is unfair to taxpayers, purchasers and the I.R.S.

Resolution of the conflicts on the questions presented is therefore necessary in order to re-establish uniform rules and reaffirm the heretofore long settled strict rule of unconditional tender for debtors.

Norton urges, first, that interest imposed under § 6337(b)(2) of the I.R.C. is to be calculated from the date of public sale (April 2, 1986); second, that even if payable from the date of each installment payment on account of the purchase price, § 6337(b)(2) requires unconditional direct tender of the purchase price plus interest prior to the surrender of the tax sales purchaser's right to the opinion and judgment of the courts on matters in controversy between the taxpayer and the tax sales purchaser.

At the outset, we are confronted with the difference between interest as a compensation for the use of money or the forbearance in demanding it when due and the fact that not only is the twenty percent provided for in § 6337(b)(2) of the Code "more than the value of the use of the money," but it was added by the statute to the forced sale purchase price to make a single sum and "must be treated as part of one corpus." *New York v. Jersawit*, 263 U.S. 493 (1924).

In 1954, prior to a tax sale, delinquent taxes were subject to an imposition of six percent interest per annum pursuant to § 6601 of the Code. At the same time, twenty percent interest was added to the purchase price of a taxpayers real property sold pursuant to § 6337(b)(2) of the Code. Clearly, the twenty percent added was designed to induce greater promptness on the part of taxpayers in the performance of their duty to pay taxes through the knowledge that after sale they will have to pay more than three times that which Congress had determined as fair and reasonable interest on

unpaid taxes prior to sale under § 6601 of the Code.

It should not be overlooked that the Circuit Court's construction here of Congress' intent with respect to § 6337(b)(2) of the Code provides a ready avenue to speculation by the taxpayer on the foreclosure sale of his land. Congress could not have intended that the taxpayer should be able to take advantage of his own delinquency in the payment of his taxes.[2]

The history of the privilege of redemption permitted under our Code is enlightening on the question of Congress' intent. The Act of June 30, 1864 (13 Stat. 223, 225) relating to redemption after sale is substantially similar to the present day § 6337(b). Originally, the period for redemption was one year. Congress, thereafter, finding that a long redemption period after sale tended to depress the price which potential purchasers were willing to bid for the property, at first reduced the redemption period to 120 days and then settled on the present 180 days. In 1864, Congress set twenty percent per annum as the condition to be satisfied for redemption. That such rate for redemption was intended as a penalty is evidenced by the fact that from 1864 to the present date, while the Code has changed, the rate of interest for redemption after sale has at all times remained the same. Were it intended as compensation for use of purchaser's money, the rate would have

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2. For example, assume the taxpayer owes $100,000 in income taxes and that the Tax Law of 1954 was enacted before the tax sale and that pursuant to § 6601, the taxpayer was required to pay simple interest of 6% per annum on delinquent taxes. At 6% simple interest on $100,000 for 30 days, interest equals 30 days ÷ 365 days x 6% x $100,000, or $493.15. A sale takes place and the purchaser pays $100,000 to purchase the property: 20% down on Day 1 and the balance of 80% on Day 30. The taxpayer redeems on Day 30. Applying the decision of the Circuit Court in this case, the taxpayer could redeem for $372.60, or $120.55 less than the taxpayer was obligated to pay had there been no sale. The sum of $372.60 is calculated as follows: 29 days ÷ 365 days x 20% x $20,000 = $317.81; 1 day ÷ 365 days x 20% x $100,000 = $54.79.

been lower and would have fluctuated relative to the market interest rate. For one hundred and twenty-eight years, however, Congress has declined to modify the interest rate thereby affording to the delinquent taxpayer no more than the privilege to redeem with penalty.

So it is too in many other jurisdictions, that in addition to the requirement that the taxpayer repay the purchaser his purchase price, the taxpayer is required, as a further condition to his privilege of redemption, that he must pay to the tax purchaser an additional sum, which has no real relevance to the use of money. This is usually calculated as a percentage of the purchase money. Provisions of this character have therefore been held to be both just and prudent; and their constitutionality not open to question. *See Corbett v. Nutt*, 76 U.S. 464 (1871); *Augustine v. Jennings*, 42 Iowa 198 (Sup. Ct. Iowa 1876). A penalty of thirty percent was held constitutional in *Mulligan v. Hintrager*, 18 Iowa 171 (Sup. Ct. Iowa 1864); and one of forty percent in *Kittle v. Sherwin*, 11 Neb. 65, 7 N.W. Rep. 861 (Sup. Ct. Neb. 1881); and one of fifty percent in *Estes v. Stebbins*, 25 Kans. 315 (Sup. Ct. Kan. 1881). These decisions reflected the weighty considerations of policy by various state legislatures in finding that the interest exacted from the delinquent taxpayer was a penalty imposed for delinquency and not compensation to the purchaser.

It is noteworthy and supportive of Norton's contention that twenty percent interest was intended as a penalty that the amendment to the Internal Revenue Code, 26 U.S.C. § 6335(e) enacted by Congress in 1954, permitting installment payments was enacted with the announced legislative purpose that by so providing higher bids might be obtained which Congress said would benefit both the taxpayers and the government. Prior to 1954, the purchase price had to be paid in full at time of public sale. Prior to 1954 interest ran from the time of public sale under § 6335. No change was made in § 6337 by the enactment of the Internal

Revenue Code of 1954, ergo, interest continued to run from the time of the public sale notwithstanding payment of the purchase price in installments.

It should be also noted that 26 U.S.C. § 6343(b) provides that if the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return, under subd. (3), an amount of money equal to the amount of money received by the I.R.S. from the sale of such property; and, that under subd. (c)(2) of § 6343, interest shall be allowed and paid at the overpayment rate established under § 6621 from the *date of the sale* of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

The Circuit Court, in reversing Magistrate Judge Jordan and former District Court (now Circuit) Judge McLaughlin, likened the "interest" imposed under § 6337(b)(2) to the "interest" considered by this Court in *Deputy v. du Pont*, 308 U.S. 488 (1940). Clearly overlooked by the Circuit Court is the fact that not all "interest" is alike.

The case of *Deputy v. du Pont, supra,* presented the question of whether "interest" paid by the taxpayer was deductible under § 23(b) of the Revenue Act of 1928 as "interest paid or accrued . . . on indebtedness." The taxpayer there borrowed stock in order to sell it for cash to others. His contract obligated him either to return the stock or pay the carrying charges to the lender. This Court in considering the question there, stated, on page 497:

> Clearly respondent owed an obligation to the Delaware Company. But although an indebtedness is an obligation, an obligation is not necessarily an "indebtedness" within the meaning of Section 23(b). Nor are all carrying charges "interest".

Interest for the use or forbearance of money is not the same as interest imposed as a condition to redemption. Under § 6601 of the Code in 1954, six percent was considered a "fair" interest. Under New York law (both parties are domiciled and reside in New York State), the maximum rate of interest chargeable to an individual is sixteen percent. In the context of the present statute it must reasonably be thought that Congress intended twenty percent interest rate as a penalty. To read it differently — to regard interest at twenty percent as "interest for the use or forbearance of money" — is to condone usury and disregard fact for convenience.

The taxpayers (Rosens) in this case owed no monies to the purchaser (Norton). The amount payable by the taxpayer as a condition to redemption was not an amount which the taxpayer contracted to pay for the use of borrowed money. There was no borrowed money; there was no relationship between the taxpayer and the tax sale purchaser. The purchaser purchased no right to collect any money from the taxpayer. The purchaser did not forbear from collecting any money. The purchaser simply purchased the right to possession of real property from the sovereign, plus a percentage of the amount which the tax purchaser paid to the sovereign. The taxpayer, in tendering payment to the purchaser, was exercising a limited privilege of redemption, afforded him by the sovereign.

The holding of the Circuit Court in this case also conflicts with the decision of the Supreme Court of the State of New Jersey in the case of *P.R. DeBellis Enterprises, Inc. v. Lumbermen's Mutual Casualty Company*, 77 N.J. 428 (Decided August 8, 1978). *See also, Miller v. New Jersey Insurance Underwriting Association*, 82 N.J. 594 (Sup. Ct. N.J. 1980) which followed and further explained *DeBellis*. In *DeBellis*, the court held that a § 6335 real property tax purchaser's interest in real property purchased on an installment basis was to be determined by considering § 6337 and that the value as so determined was held to be the purchase price which the

tax sale purchaser paid for the real property plus interest computed on the entire purchase price from the date of purchase and not from the date of each installment purchase payment. It is respectfully submitted that the construction of § 6337 in the State of New Jersey is settled and that if the New Jersey Supreme Court had decided the case at bar, it would have decided it in favor of Norton.

The Circuit Court's interpretation of the words "amount paid" as "amounts paid" fails, *inter alia,* to properly consider that if a purchaser in an installment sale fails to complete his purchase within the statutory thirty day permitted period, he can be sued by the I.R.S. pursuant to § 6335(e)(3) for "such part of the purchase price as has not been paid, together with interest at the rate of six percent per annum *from the date of the sale*". (Emphasis supplied.) It is noteworthy that § 6601, which provides for equitable interest to the I.R.S. was fixed, as was the interest under § 6335(e)(3), at six percent when the Internal Revenue Code of 1954 was enacted. It could not have been the intention of Congress that a purchaser of the tax lien who fails to pay the balance of the purchase price should be liable for interest *from the date of the sale* while at the same time after he completes his purchase, including the payment of the delinquency interest, if any, he is to be deprived of corresponding payment from the delinquent taxpayer. Surely, Congress did not intend to reward with low effective interest rates its most egregiously delinquent taxpayers so as to encourage further or additional delinquencies of delinquent taxpayers and thus do violence to the underlying principle justifying administrative levies, which is, the need of the government to promptly secure its revenues, *Phillips v. Commissioner*, 283 U.S. 589, 596 (1931).

The words "amount paid" have to be construed in concert with § 6338(a) of the Code. If the dates of payment and amounts of each payment under the installment purchase provisions of § 6335(e)(3) were important to the computation of the proper redemption

amount, Congress surely would have required that the amounts and dates of such installment payments be listed on the Certificate of Sale. Congress, however, did not require the listing of such information on the Certificate of Sale under § 6338(a) because it did not intend that interest be computed on "amounts paid" but only on the "amount paid" or "price paid". (*See* Appendix 55a for Certificate of Sale delivered to Norton.)

A tax sale certificate is a written certification by the official making the sale of the facts with respect to the sale (*see* 85 C.J.S. § 822). The plain and common sense object of a statutory provision providing for a certificate of sale and the facts contained therein is to give confidence to purchasers that they will have the necessary facts in an official government certificate so that they are encouraged to perform their useful and necessary public policy purpose in the government economy — the purchase of property at tax sales. Congress did not intend to trick purchasers or to lessen the interest of potential purchasers in I.R.S. tax sales when it amended § 6335 to provide for installment sales by failing to require the Certificate of Sale list necessary facts. When Congress amended Section 6335 in 1954 the clear intent was to permit the I.R.S. more freedom in the methods of holding the sale of seized property to obtain the highest price possible to the benefit of both the taxpayer and Government, (*see* U.S.C.A. 83rd Congress - Second Session, Volume 3, p. 4133 (House Report), to the same effect, p. 4777 (Senate Report)). *See also*, U.S.C.A. 83rd Congress, Second Session, Volume 3, p. 4558 House Report and p. 5229 (Senate Report) Section 6337, "Redemption of Property", wherein Congress states that no material change from existing law was intended.

When Congress used the words "redeem" or its past tense "redeemed" in § 6337 (the words not being specially defined), each of these words was required to be interpreted as having its ordinary, contemporary, common meaning. *Perrin v. United States*, 444 U.S. 37 (1979).

The word "redeem", is defined in *Black's Law Dictionary*, 6th Ed. 1278 as meaning: "To buy back. To free property or article from mortgage or pledge by paying the debt for which it stood as security. To repurchase in a literal sense; as, to redeem one's land from a tax-sale. It implies the existence of a debt and means to rid property of that encumbrance".

Since the ordinary, contemporary, common meaning of the words "redeem" and "redeemed" requires the finding that Rosens were still debtors after the tax sale (*accord, see Krassner v. Veneman*, 206 Cal. App. 2d 299 (D. C. App. 3d Calif. 1962) holding the taxpayer as a debtor after the tax sale) the strict rule of unconditional tender applies. Thus, the holding of the Circuit Court here that a redeemer is entitled to demand the delivery of the certificate of sale as *quid pro quo* for his check conflicts with the Eighth Circuit's holding in *Murray v. United States*, 686 F.2d 1320 (1982), *cert. denied*, 459 U.S. 1147 (1983). In *Murray*, the court held that the privilege of redemption arises only in connection with the tax levy, and is an "integral facet" of such a levy and that a claim founded on redemption is clearly a claim arising in respect of the collection of a tax within the meaning of 28 U.S.C. § 2680(c). *See also, Cipriano v. Tocco*, 91-1 U.S.T.C. ¶ 50, 132 (E.D. Mich. So. Div. 1991) following *Murray, supra*, where the District Court held the I.R.S.'s duty to convey a tax deed is equally integral to the assessment or collection of a tax.

The tender of a sum, even when the amount is not controverted (and in this case it is), coupled with a demand that the other party perform some other act (in this case, Rosens demanded Norton simultaneously exchange the certificate of sale for the check), or surrender some other right, as a condition of its acceptance, is bad, for the simple reason that the party making the tender has no right to attach a penalty to the tender. *See Beardsley v. Beardsley*, 86 Fed. 16, 22 (8th Cir. 1898); *see also, Bohler v. Calloway*, 267 U.S. 479, 492 (1925) confirming the strict rule of unconditional tender (a

tender upon condition that it be received as full payment where the amount is not controverted is a defective tender). The Circuit Court's holding that the Rosens were entitled to demand the Certificate of Sale from Norton thus appears to be in direct conflict with this Court's decisions. *See also, State Railroad Tax Cases,* 92 U.S. 575 (1876) (tax debts must be tendered without the condition annexed of a receipt in full).

This Court's decision in *Bohler* was reaffirmed in the case of *Silver Bell Industries Inc. v. United States, et al.*, 74-2 U.S.T.C. ¶ 9691, (D. Colo. 1974), *affirmed* 76-1 U.S.T.C.¶ 9432 (10th Cir. 1976), *cert. denied,* 429 U.S. 822 (1976) where the Court held that, no reason need be given for tax sale purchasers' rejection of a defective tender. The Rosens have never made any claim, nor is there any evidence in the record, that the Rosens would have made an unconditional tender in the correct amount had Norton given his reasons for declining the tender.

The rule stated long ago in the landmark case of *Keely v. Sanders*, 99 U.S. 441 (1879), that there are to be no exceptions from the general provisions of a tax redemption statute to meet the circumstances of a hard case when the harsh result was intended and imposed by the Congress and not by the judicial process appears not to have been followed by the Circuit Court. The American self-assessment system of income taxation works because there are "rules of the game" which all taxpayers are expected to know and follow and which rules were available to the Rosens and their attorneys on whose advice the Rosens admit they relied. This Court, in *Clark v. Barnard*, 108 U.S. 436 (1883) long ago required our courts not to interfere to mitigate the penalty or forfeiture, if incurred, for non-payment of taxes, for to do so would be in contravention of the direct expression of the legislative will. Such result is required even if hardship and injustice be occasioned. *See Johnson v. United States,* 602 F.2d 734, 739 (6th Cir. 1979).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWIN L. WOLF
*Attorney for Petitioner*

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JULY 23, 1992

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1760—August Term 1991

(Argued: June 25, 1992 Decided: July 23, 1992)

Docket No. 92-6072

RICHARD ROSEN, and SUSAN ROSEN,

*Plaintiffs-Appellants*,

—against—

JEROME J. NORTON, and
UNITED STATES OF AMERICA,

*Defendants-Appellees*.

Before:

NEWMAN, PRATT and WALKER,

*Circuit Judges*.

Appeal from a judgment of the United States District Court for the Eastern District of New York, David F. Jordan, *Magistrate Judge*, awarding defendant Norton $84,035.65 for the Rosens' use and occupancy of their

home, which was purchased by Norton at a tax sale, and dismissing the Rosens' complaint.

Reversed and remanded with instructions.

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DAVID I. ROSENBERG, Garden City, NY, *for Plaintiffs-Appellants.*

EDWIN L. WOLF, Jericho, NY (Wasserman, Chinitz, Geffner, Green & Wolf, Jericho, NY, of Counsel), *for Defendant-Appellee Jerome J. Norton.*

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PRATT, *Circuit Judge*:

Because of non-payment of income taxes, the Internal Revenue Service acquired a tax lien on Richard and Susan Rosen's condominium in Syosset, New York. Jerome Norton bought the lien on April 2, 1986, for $137,500, and paid for it in three installments throughout that month, as permitted by 26 U.S.C. § 6335(e)(2)(D). The Rosens attempted to redeem their property on September 29, 1986, by tendering to Norton a check in the amount of $151,250. *See* 26 U.S.C. § 6337(b). This amount represented the $137,500 paid by Norton, plus $13,750, representing 20% per annum interest, compounded annually on the entire purchase price from April 2, 1986. When the Rosens' attorney showed up at Norton's home with the certified check, Norton said "I refuse the tender. Goodbye", and shut the door.

The Rosens filed this action in October 1986 seeking to compel Norton to accept the tender. In 1987, then-District

*Appendix A*

Judge McLaughlin, in denying summary judgment, concluded that the tender was $498.86 deficient because of the Rosens' use of an annual compounding rate, rather than the daily calculation required by 26 U.S.C. § 6622. The case proceeded, based on the assumption that the tender was deficient. Roughly five years later, the district court (David F. Jordan, *Magistrate Judge*), entered judgment awarding title to Norton and dismissing the Rosens' complaint. On February 14, 1992, the district court amended the judgment. It confirmed the award of title to Norton, but in addition awarded him $84,035.65 on his counterclaim for the Rosens' use and occupancy of their house while the litigation had been pending.

It is correct that the Rosens did not use the proper method of calculation, but their error in calculating the amount of the tender actually resulted in an overpayment, not a deficiency. The district court erred by calculating daily interest on the entire purchase price from the date of sale (April 2, 1986), instead of from the date each payment was made to the IRS. Section 6337(b)(2) of Title 26 provides that the price of redemption is "the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum." Plainly, the "amount paid" by Norton was $30,000 on April 2, 1986, $16,000 on April 16, 1986, and $91,500 on April 28, 1986, and it is only on these sums and from these dates that Norton was entitled to interest.

The plain language of this section also comports with common sense. Since interest is "compensation for the use or forbearance of money", *Deputy v. du Pont*, 308 U.S. 488, 498 (1940), it would be anomalous to allow Norton to recoup compensation for monies not yet used. Norton therefore was entitled to daily interest on $30,000

for 180 days (April 2 to September 29), on $16,000 for 166 days (April 16 to September 29), and on $91,500 for 154 days (April 28 to September 29).

Under the factors in Rev. Proc. 83-7, §1, table 26, the following is the correct method for calculating the daily interest on the amounts paid by Norton in installment payments:

| *Date* | *Payment* | *Days* | *Factor* | *Interest* |
|---|---|---|---|---|
| 4/2/86 | $30,000 | 180 | .103628076 | $3,108.84 |
| 4/16/86 | $16,000 | 166 | .095196588 | $1,523.15 |
| 4/28/86 | $91,500 | 154 | .088020886 | $8,053.91 |
| | | | | $12,685.90 |

Thus, by tendering $13,750 in interest, the Rosens actually overpaid, rather than underpaid. Since they provided a legally-sufficient tender on September 29, 1986, they were then entitled to have Norton surrender the certificate of sale to them. The Rosens have acknowledged that they are bound by the amount they tendered, and they have waived any claim to recover the overpayment.

In light of our conclusion that the Rosens made a sufficient tender, Norton is not entitled to any money for the Rosens' use and occupancy of their own home. The judgment of the district court is therefore reversed, and the case is remanded with a direction to enter judgment ordering Norton to accept the Rosens' tender and to deliver the certificate of sale to the Rosens upon receipt from the title company of the tendered certified check for $151,250 that was delivered to the title company in escrow, or if that escrow has been terminated, upon receipt of a substitute check in the same amount.

Reversed.

## APPENDIX B — STIPULATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 9, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON,

Defendant.

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto as follows:

On consent, at the request of the defendant, Norton, that the order dated November 13, 1992, amended November 25, 1992, at the request of the plaintiffs, Rosen, be further amended to the extent that the date for delivery of the check in conjunction with this matter to Jerome J. Norton shall be adjourned to 11:00 a.m. at the drawee bank on January 13, 1993.

On consent, this adjournment is not to be considered as a waiver on the part of either party of any rights that they may have, except that defendant, Norton, waives any right that he may have to

collect additional interest on any judgment entered in his favor in this case for the period of time between the date hereof and January 13, 1993.

Dated: Jericho, New York
December 9, 1992

WASSERMAN, CHINITZ, GEFFNER, GREEN & WOLF, ESQS.
Attorneys for Jerome J. Norton

By: s/ Edwin L. Wolf
Edwin L. Wolf

DAVID I. ROSENBERG, P.C.
Attorneys for Richard Rosen
and Susan Rosen

By: s/ David I. Rosenberg
David I. Rosenberg

SO ORDERED
Dated: Hauppauge, New York
December 1992

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 25, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON,

Defendant.

ORDER

On consent, the order dated November 13, 1992, is amended to the extent that the date for delivery of the check in conjunction with this matter to Jerome J. Norton, shall be adjourned for two weeks from November 30, 1992, to December 14, 1992, at 11:00 a.m.

On consent, this adjournment is not to be considered as a waiver on the part of the defendant Norton of any rights he may have such as, for example, to petition the Supreme Court for a Writ of Certiorari.

SO ORDERED.

*Appendix C*

Dated: Hauppauge, New York
November 25, 1992

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 18, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

An order of Hon. David F. Jordan, United States Magistrate Judge, having been filed on November 13, 1992, directing the Clerk of the Court to enter judgment pursuant to the Order of the United States Court of Appeals for the Second Circuit, dated July 23, 1992 which reversed the judgment of this court entered on June 13, 1991 and amended on February 10, 1992, it is

ORDERED and ADJUDGED that the judgments heretofore entered in this action are vacated; that the defendant Jerome J. Norton accept the tender of the plaintiffs, Richard Rosen and Susan Rosen in the amount of One Hundred Fifty-One Thousand Two Hundred Fifty and 00/100 ($151,250.00); that the certified check be delivered to Jerome J. Norton at the drawee bank on November 30, 1992 at 11 a.m. for immediate endorsement and

payment; that upon acceptance of the check by the drawee bank, Mr. Norton shall deliver the certificate of sale to Richard Rosen and Susan Rosen; that parties may substitute any alternative method of compliance on written consent; and that plaintiffs are awarded costs of the action, including those awarded by the Court of Appeals.

Dated: Hauppauge, New York
November 18, 1992

ROBERT C. HEINEMANN
Clerk of the Court

By: s/ Joseph DiTalia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

## APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 13, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON AND UNITED STATES OF AMERICA,

Defendants.

ORDER

Pursuant to the Order of the United States Court of Appeals for the Second Circuit dated July 23, 1992, the Clerk of the Court is directed to enter judgment as follows:

Defendant Jerome J. Norton is directed to accept the tender of the plaintiffs, Richard Rosen and Susan Rosen, and to deliver the certificate of sale to them upon receipt from the title company of the tendered certified check for One Hundred Fifty One Thousand Two Hundred Fifty and 00/100 ($151,250.00) Dollars that was delivered to the title company in escrow, or if that escrow has been terminated, upon receipt of a substitute check in the same amount.

The check shall be delivered to Jerome J. Norton at the drawee bank at 11:00 a.m., November 30th, 1992, immediately endorsed

by Mr. Norton and presented for payment. Upon acceptance by the drawee bank, Mr. Norton shall deliver the certificate of sale to Richard Rosen and Susan Rosen.

The parties may substitute any alternative method of compliance upon their written consent.

Plaintiffs are awarded costs of the action, including those awarded by the Court of Appeals.

SO ORDERED.

Dated: Hauppauge, New York
November 13, 1992

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX F — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED FEBRUARY 14, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369

RICHARD ROSEN AND SUSAN ROSEN

Plaintiffs,

-against-

JEROME J. NORTON, and the UNITED STATES OF AMERICA

Defendants.

AMENDED JUDGMENT

Findings of fact, conclusions of law, decision and order of Honorable David F. Jordan, United States Magistrate Judge, having been filed on February 10, 1992, directing the Clerk of Court to amend the judgment entered on June 13, 1991 dismissing the complaint, and adding an award of $84,035.65, plus interest from January 01, 1992, in favor of defendant Jerome J. Norton and against plaintiffs Richard Rosen and Susan Rosen, jointly, it is

ORDERED and ADJUDGED that the judgment entered on June 13, 1991 is amended; that the plaintiffs take nothing of the defendants; that the complaint is dismissed, with costs to the defendant Jerome J. Norton; that all temporary restraining orders are terminated; that the United States of America shall issue to defendant Jerome J. Norton a good and satisfactory deed to the

subject premises; that plaintiffs Richard Rosen and Susan Rosen, jointly, shall pay to defendant Jerome J. Norton the amount of $84,035.65 for use and occupancy of the subject premises, as of January 01, 1992, plus 9% interest from January 01, 1992 to date of entry of judgment, February 14, 1992, in the sum of $932.40, for a total of $84,968.05; and that post-judgment interest shall accrue at the rate of 4.21% as provided in 28 U.S.C., Sec. 1961.

ROBERT C. HEINEMANN
Clerk of the Court

By: s/ Joseph DiTalia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

Dated: Hauppauge, New York
February 14, 1992

## APPENDIX G — FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED FEBRUARY 7, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and the UNITED STATES of AMERICA,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER[1]

I

Motion by defendant Norton, by counsel's letter dated December 11, 1991, for an order vacating the Order of September 23, 1991 wherein the Court stayed defendant United States of America from delivering the deed described in the judgment herein pending the decision of the Court of Appeals on the appeal by plaintiffs from that judgment. Plaintiffs respond, without addressing the motion, by letter dated December 12, 1991.

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1. Pursuant to stipulation, the case was tried before the undersigned magistrate judge, without a jury, with any appeal to be taken to the Courts of Appeals. 28 U.S.C. 636(c)(1)(3).

*Appendix G*

Motion is granted. As plaintiffs' Notice of Appeal was withdrawn prior to the issuance of that Order, the Order of this court dated and filed on September 23, 1991 (Docket Entry #90) is vacated.

II

By order dated September 23, 1991, defendant Norton's motion to alter and amend the judgment entered by this Court dated June 13, 1991 was granted. The amendment awards him a reasonable sum for the use and occupancy of the subject premises. Hearings were held December 5, 1991 and January 13, 1992 to determine the amount to be awarded.

Norton has shown by a preponderance of the evidence that the fair rental value of the subject premises was $2,100.00 per month during calendar year 1991, with other specified lesser amounts for prior years [2]. However, any payment of taxes, common charges, assessments or the pre-existing mortgage would serve as credits against the amount to be paid to defendant Norton.

The evidence admitted at the hearing of January 13, 1992 shows that plaintiffs have caused to be paid property taxes, the pre-

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2. The reasonable value for use and occupancy of the subject property was shown to be:

$1,750 per month during calendar year 1986;
$1,800 per month during calendar year 1987;
$1,900 per month during calendar year 1988;
$1,950 per month during calendar year 1989;
$2,000 per month during calendar year 1990; and
$2,100 per month during calendar year 1991.

existing mortgage with Roosevelt Savings Bank ("Roosevelt") of $48,145.40, and monthly common charges and assessments to Hidden Ridge II Condominiums.

Credits for Payment of Property Taxes

The evidence presented at the January 13, 1992 hearing includes a copy of the annual loan statement for 1990 from Fidelity New York FSB ("Fidelity"). This exhibit indicates that a disbursement of $5,485.81 was made for real estate taxes. On Schedule A, line 6 of the copy of the Rosens' 1990 federal income tax return[3], the entry indicates that $5,486 was paid in real estate taxes. In the absence of evidence to the contrary, the court finds that the copies of the tax returns for the three prior years[4] serve as credible evidence of the real estate taxes paid in those years. The Court, therefore, overrules defendant's objection, made at the hearing on January 13, 1992, to the introduction of this evidence.

However, evidence was presented that reductions in property taxes were issued and refunds remitted by the County of Nassau. Accordingly, the credits available to the Rosens must be reduced by the amounts of the refunds received. Plaintiffs submit that the only refund received was in 1989, in the amount of $1,038. The court finds, however, that more weight must be afforded to the certified statement of the Deputy County Treasurer which indicates that a refund of $124.32 was made on September 17, 1987 and a total of $1,554.69 was refunded on August 24, 1989.

Therefore, it is the finding of this Court that plaintiffs are

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3. Plaintiffs' exhibit 4.

4. Plaintiffs' exhibits 1-3.

entitled to credits for the payment of real estate taxes on the subject property in the following amounts: $5,626 for 1987, $6,073 for 1988, $6,134 for 1989, and $5,486 for 1990, reduced by $124 (as of October 1987) and by $1,554 (as of September 1989) due to the property tax refunds. The Court would consider an additional credit for real estate taxes paid in 1991, based upon presentation of the annual loan statement for 1991 from Fidelity. In as much as there is only partial evidence as to what portion of the taxes for each year are county taxes[5] and what portion is school taxes[6], these tax payments will be deemed to have all been made on July 1 of the subject year.

Credit for Payment of the Pre-existing Mortgage

Norton purchased the property subject to a mortgage lien held by Roosevelt Savings Bank. Furthermore, on April 1, 1986, the Rosens obtained a new mortgage loan from Fidelity New York FSB. They used a portion of the proceeds of that loan to satisfy the Roosevelt mortgage. Norton objects to the receipt of evidence of the Fidelity loan. However, it is relevant to determining the amount creditable against him. The objection to the introduction of this evidence, therefore, is overruled.

With respect to that pre-existing Roosevelt mortgage, the evidence indicates that as of July 19, 1985, there was a $48,390.31 encumbrance upon the subject property. Additionally, the evidence shows that $48,145.40 was paid to Roosevelt on September 22, 1986[7] and that the mortgage had been satisfied as of November 20, 1986.

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5. Nassau County taxes are due in February and August of each year.

6. School taxes are due in May and November of each year.

7. Plaintiffs' exhibit 15A.

*Appendix G*

The $48,145.40 paid to Roosevelt was comprised of two checks. One check for $35,395.40 was drawn on a draft account of Fidelity, pursuant to the loan agreement between Fidelity and the Rosens, and the other, for $12,750, was drawn on a draft account of Katz & Bernstein, the Rosens' attorneys.

It is undisputed that inasmuch as the Rosens discharged $12,750 of the pre-existing mortgage with their separate funds, they should receive a credit for that amount. However, the parties disagree on the disposition of the balance. The Rosens maintain that they have, in fact, discharged the debt in full and should receive credit for the entire amount. Norton maintains that the property is still encumbered by the balance of the Roosevelt lien and that no credit beyond the $12,750 should be allowed.

As proceeds of the Fidelity mortgage were used, in part, to satisfy the obligation to Roosevelt, Fidelity has become equitable subrogated to the Roosevelt lien to the extent of the $35,395.40 paid by it. *Union Savings Bank of Patchogue v. Dudine*, 242 N.Y.S.2d 692 (Sup. Ct. Suffolk County 1963).

Certainly, there is nothing in this record to support a finding that the Fidelity obligation has been discharged in its entirety. It is the judgment of this Court that Norton has been benefitted by the Rosens' payment of $12,750 and that Norton is otherwise obligated for that portion of the Roosevelt mortgage to which Fidelity has become equitably subrogated. Therefore, consistent with the principles of equity, the Rosens are entitled to a credit for the $12,750, as of November 1, 1986, but no credit is applicable for the remainder paid to Roosevelt by Fidelity.

*Appendix G*

Credits for Common Charges and Assessments

The evidence further reveals that plaintiffs are entitled to credits for payments of monthly common charges and assessments made by them in the following amounts:

$207.40 per month for the period October through December 1986;
$225.05 per month for the period January 1987 through August 1987, except June;
$345.05 for June 1987;
$222.01 for September 1987;
$352.67 for October 1987;
$352.68 for November 1987;
$352.68 for December 1987;
$222.01 per month for the period January 1988 through October 1989, except March, May, and June 1988;
$237.01 per month for March, May, and June 1988;
$249.55 for November 1989;
$274.63 for December 1989;
$234.55 per month for the period January through April 1990;
$430.80 for May 1990;
$409.55 per month for June and August 1990;
$394.55 per month for July and September 1990;
$234.55 per month for the period October 1990 through January 1991;
$269.55 for February 1991;
$244.55 per month March and April 1991;
$394.55 per month for May and June 1991;
$384.55 for July 1991;
$304.55 per month for August and October 1991; and
$259.55 for September 1991.

*Appendix G*

Although no evidence was introduced as to payments of monthly common charges and assessments subsequent to October 1991, the court finds that a reasonable inference may be made that the Rosens made creditable payments of at least $259.55 per month for November and December 1991.

Calculation of the Amount Due

In determining the precise amount of the judgment for use and occupancy, the date when the Rosens' obligation attached must be determined. The principle in New York is that the "landlord tenant relationship is a *sine qua non* of use and occupancy recovery." *Glickman v. Glenwood-Syosset Appliance Corp.*, 257 N.Y.S.2d 498 (Sup. Ct. App. Term 2d Dept. 1965). This relationship is not implied by "mere occupancy": the circumstances must be such as give rise to the inference of an agreement. *Marrano v. State*, 364 N.Y.S.2d 751 (Ct.Cl. 1975).

Although the inference of a landlord-tenant relationship can only have arisen when title was fully vested in Norton, that event occurred when the Rosens failed to redeem the property. *Nassau County v. Dunn*, 11 N.Y.S.2d 955 (Nassau County Ct. 1939). Therefore, on September 29, 1986, when the Rosens' insufficient tender was refused and the statutory redemption period expired, the requisite relationship was established and the Rosens became liable for use and occupancy of the subject premises.

Additionally, interest accrues at a rate of 9% per annum, N.Y. Civ. Prac. L. & R. 5002, 5004, commencing October 1, 1986.

The use and occupancy to be properly assessed against the

*Appendix G*

plaintiffs is $122,050[8] plus interest[9], for a total, as of January 1,

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8. For 1986, 3 months at $1,750/mo. = $ 5,250
   For 1987, 12 months at $1,800/mo. = $ 21,600
   For 1988, 12 months at $1,900/mo. = $ 22,800
   For 1989, 12 months at $1,950/mo. = $ 23,200
   For 1990, 12 months at $2,000/mo. = $ 24,000
   For 1991, 12 months at 2,100/mo. = $ 25,200
   $ 122,050

9. ($ 1,750)(.0075) = $ 13.13
   ($ 3,500)(.0075) = $ 26.25
   ($ 5,250)(.0075) = $ 39.78
   ($ 7,050)(.0075) = $ 52.88
   ($ 8,850)(.0075) = $ 66.30
   ($10,650)(.0075) = $ 79.88
   ($ 12,450)(.0075) = $ 93.38
   ($ 14,250)(.0075) = $106.88
   ($ 16,050)(.0075) = $120.38
   ($ 17,850)(.0075) = $133.88
   ($19,650)(.0075) = $147.38
   ($ 21,450)(.0075) = $160.88
   ($ 23,250)(.0075) = $ 174.38
   ($ 25,050)(.0075) = $ 187.88
   ($ 26,850)(.0075) = $ 201.38
   ($ 28,750)(.0075) = $ 215.63
   ($ 30,650)(.0075) = $ 229.88
   ($ 32,550)(.0075) = $ 244.13
   ($ 34,450)(.0075) = $ 258.38
   ($ 36,350)(.0075) = $ 272.63
   ($ 38,250)(.0075) = $ 286.88
   ($ 40,150)(.0075) = $ 301.13
   ($ 42,050)(.0075) = $ 315.38
   ($ 43,950)(.0075) = $ 329.63
   ($45,850)(.0075) = $ 343.88
   ($ 47,750)(.0075) = $ 358.13
   ($ 49,650)(.0075) = $ 372.38

(Cont'd)

*Appendix G*

1992, of $150,499.68. The proven credits due to the Rosens total

(Cont'd)

($ 51,600)(.0075) = $387.00
($ 53,550)(.0075) = $401.63
($ 55,500)(.0075) = $416.25
($ 57,450)(.0075) = $430.88
($ 59,400)(.0075) = $445.50
($ 61,350)(.0075) = $460.13
($ 63,300)(.0075) = $474.75
($ 65,250)(.0075) = $489.38
($ 67,200)(.0075) = $504.00
($ 69,150)(.0075) = $518.63
($ 71,100)(.0075) = $533.25
($ 73,050)(.0075) = $547.88
($ 75,050)(.0075) = $562.88
($ 77,050)(.0075) = $577.88
($ 79,050)(.0075) = $592.88
($ 81,050)(.0075) = $607.88
($ 83,050)(.0075) = $622.88
($ 85,050)(.0075) = $637.88
($ 87,050)(.0075) = $652.88
($ 89,050)(.0075) = $667.88
($ 91,050)(.0075) = $682.88
($ 93,050)(.0075) = $697.88
($ 95,050)(.0075) = $712.88
($ 97,050)(.0075) = $727.88
($ 99,150)(.0075) = $743.63
($101,250)(.0075) = $759.38
($103,350)(.0075) = $775.13
($105,450)(.0075) = $790.88
($107,550)(.0075) = $806.63
($109,650)(.0075) = $822.38
($111,750)(.0075) = $838.13
($113,850)(.0075) = $853.88

(Cont'd)

*Appendix G*

$50,917.49[10]. Adding interest[11], a total of $66,464.03 is creditable as January 1, 1992. The difference, $84,035.65, is net amount owed by the Rosens to Norton for use and occupancy of the subject

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(Cont'd)

| | | |
|---|---|---|
| ($115,950)(.0075) | = | $869.63 |
| ($118,050)(.0075) | = | $885.38 |
| ($120,150)(.0075) | = | $901.13 |
| ($122,250)(.0075) | = | $916.88 |
| TOTAL | = | $28,449.68 |

10. Property taxes totalling $21,641.00
plus payment of the Roosevelt lien of 12,750.00
plus common charges and assessments of 16,526.49
TOTAL = $50,917.49

11.
| | | |
|---|---|---|
| ($ 207.40)(.0075) | = | $ 1.56 |
| (13,164.80)(.0075) | = | 98.74 |
| (13,372.20)(.0075) | = | 100.29 |
| (13,597.25)(.0075) | = | 101.98 |
| (13,822.30)(.0075) | = | 103.67 |
| (14,047.35)(.0075) | = | 105.36 |
| (14,272.40)(.0075) | = | 107.04 |
| (14,497.45)(.0075) | = | 108.73 |
| (14,842.50)(.0075) | = | 111.32 |
| (20,693.55)(.0075) | = | 155.20 |
| (20,918.60)(.0075) | = | 156.89 |
| (21,140.61)(.0075) | = | 158.55 |
| (21,369.28)(.0075) | = | 160.27 |
| (21,736.96)(.0075) | = | 163.03 |
| (22,089.64(.0075) | = | 165.67 |
| (22,311.65)(.0075) | = | 167.34 |
| (22,533.66)(.0075) | = | 169.00 |
| (22,770.67)(.0075) | = | 170.78 |
| (22,996.68)(.0075) | = | 172.45 |

(Cont'd)

*Appendix G*

premises, as of January 1, 1992.

If it should ultimately be held that the Rosens are entitled to redeem the subject premises, any amounts paid for use and

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(Cont'd)

(23,229.69)(.0075)=174.22
(23,466.70)(.0075)=176.00
(29,761.71)(.0075)=223.21
(29,983.72)(.0075)=224.88
(30,205.73)(.0075)=226.54
(30,427.74)(.0075)=228.21
(30,649.75)(.0075)=229.87
(30,871.76)(.0075)=231.54
(31,093.77)(.0075)=233.20
(31,315.78)(.0075)=234.87
(31,537.79)(.0075)=236.53
(31,759.80)(.0075)=238.20
(31,981.81)(.0075)=239.86
(32,203.82)(.0075)=241.53
(38,559.83)(.0075)=289.20
(38,781.84)(.0075)=290.86
(37,449.85)(.0075)=280.87
(37,671.86)(.0075)=282.54
(37,921.41)(.0075)=284.41
(38,196.04)(.0075)=286.47
(38,430.59)(.0075)=288.23
(27,994.94)(.0075)=209.96
(38,899.69)(.0075)=291.75
(39,134.24)(.0075)=293.51
(39,565.04)(.0075)=296.74
(39,974.59)(.0075)=299.81
(45,855.14)(.0075)=343.91
(46,264.69)(.0075)=346.99
(46,659.24)(.0075)=349.94
(46,893.79)(.0075)=351.70

(Cont'd)

occupancy would be a credit against the amount needed for redemption.

ORDER

The Clerk is directed to issue an amended judgment adding a provision awarding judgment in favor of defendant Norton, and against plaintiffs Richard Rosen and Susan Rosen jointly, for $84,035.65 with interest thereon at 9% per annum from January 1, 1992 to date of entry of judgment. Post-judgment interest accrues as provided in 28 U.S.C. § 1961.

SO ORDERED.

Dated: Hauppauge, New York
February 7, 1992

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

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(Cont'd)

| | | |
|---|---|---|
| (47,128.34)(.0075) | = | 353.46 |
| (47,362.89)(.0075) | = | 355.22 |
| (47,597.44)(.0075) | = | 356.98 |
| (47,866.99)(.0075) | = | 359.00 |
| (48,111.54)(.0075) | = | 360.84 |
| (48,356.09)(.0075) | = | 362.67 |
| (48,750.64)(.0075) | = | 365.63 |
| (49,145.19)(.0075) | = | 368.59 |
| (49,529.74)(.0075) | = | 371.47 |
| (49,834.29)(.0075) | = | 373.76 |
| (50,093.84)(.0075) | = | 375.70 |
| (50,398.39)(.0075) | = | 377.99 |
| (50,657.94)(.0075) | = | 379.93 |
| (50,917.49)(.0075) | = | 381.88 |
| TOTAL | = | $15,546.54 |

## APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 10, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and the UNITED STATES OF AMERICA,

Defendants.

ORDER

Upon review of the evidence presented at the hearing on December 5, 1991, it is apparent that Norton has presented evidence to the effect that the fair rental value of the subject premises is $2,100.00 per month during 1991 with other specified lesser amounts for prior years. It is also apparent that these sums are based upon payment of taxes, common charges, assessments and mortgage (principal and interest) by the owner. These sums if they were paid by a party other than the landlord, would serve as a credit against the amount fairly to be paid to the landlord. In short, they constitute payment, which is an affirmative defense. Rule 8, Fed. R. Civ. P.

No evidence was presented as to any such credits. The only evidence was to the effect that none of these amounts were paid by Norton.

*Appendix H*

The Rosens chose to defend this claim solely on the basis that Mr. Norton had not yet received title to the property and therefore was not entitled to receive payment for use and occupancy. This argument is rejected. Transfer of title to Mr. Norton has been ordered. It is being delayed simply because of actions taken by the Rosens. Accordingly, for purposes of this motion, Mr. Norton holds equitable title to the property and is entitled to be paid for its use and occupancy. *Compare, David v. Rio Rancho Estates Inc.*, 401 F.Supp. 1045 (S.D.N.Y. 1975); *Nassau County v. Dunn*, 11 N.Y.S.2d 955 (Co. Ct., Nassau Co. 1939).

Therefore, in the interest of justice, and on the court's own motion, the Rosens will be given an opportunity to present evidence of payment of any sums which would serve as offsets to a claim by the equitable owner for use and occupancy of the premises.

Accordingly, this hearing is reopened for that purpose, to be held at the Hauppauge Courthouse on Thursday, December 19, 1991, at 2:00 p.m.

SO ORDERED.

Dated: Hauppauge, New York
December 9, 1991

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX I — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 23, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and the UNITED STATES OF AMERICA,

Defendants.

DECISION AND ORDER

Motion by defendant Jerome Norton, a tax lien sale purchaser, to alter and amend the Judgment entered by this Court dated June 13, 1991, so as to award him a reasonable sum for the use and occupancy of the subject premises.[1] Judgment has been entered in

1. This motion is decided on the following papers:

| Entry | Date | Description |
|---|---|---|
| 80 | June 20, 1991 | Norton's Notice of Motion with attached papers. |
| 81 | July 2, 1991 | Opposing affidavit of Sutter |
| 85 | August 8, 1991 | Norton's Memorandum of Law |
| | August 14, 1991 | Rosen's Memorandum of Law |
| | August 19, 1991 | Norton's Reply Memorandum of Law |

favor of the defendant and against the plaintiffs dismissing their complaint. Previously, Defendant had filed a counterclaim seeking recovery for reasonable use and occupancy of the house which was at issue in that action. This counterclaim, which was not addressed by the June 13, 1991 Judgment, forms the basis for the relief sought.

Plaintiffs oppose on jurisdictional grounds.

In exercise of its discretionary jurisdiction, this court finds that defendant Norton has sufficiently provided authority for this court to decide his motion pursuant to Fed. R. Civ. P. 59.

## DISCUSSION

The plaintiffs raise a question concerning the ability of this court to adjudicate this matter. Their assertion that the counterclaim in question is a permissive one requiring an independent jurisdictional ground is an inappropriate characterization. This court finds the isue to be well within its ancillary jurisdictional reach. The original action was brought by the plaintiffs pursuant to Title 26 of the Internal Revenue Code of 1954, as amended, Section 6337(b). The defendant's counterclaim for use and occupancy arises from a "common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The counterclaim for use and occupancy clearly relates to the facts of the original complaint.

Plaintiffs' property was seized and subsequently bought by the defendant at public auction. Pursuant to 26 U.S.C. 6339(a)(2), the resulting certificate of sale would transfer to the purchaser all rights, title and interest of the delinquent party to the property sold. *Roig Commercial Bank v. Dueno*, 617 F.Supp. 913 (D.P.R. 1985). The plaintiffs' success in obtaining a stay of the issuance of the

deed to the subject premises by the federal government to the defendant purchasers has allowed the plaintiffs to remain on the very property which they had lost through their own tax payment delinquencies. This occupancy has frustrated the defendant's rightful use and enjoyment of the premises. Such a logical relationship between the two claims cannot be masked and this court, in recognizing this, seeks to further the notion of judicial economy by ruling on the issue at this time. See *Computer Associates International, Inc. v. Altai*, 893 F.2d 26 (2nd Cir. 1990), *see also* of Fed. R. Civ. P. 13(a).

Additionally, the plaintiffs assert that the defendant's counterclaim for use and occupancy "go[es] far beyond the purview" of their initial claim seeking clarification of title and redemption under the Internal Revenue Code. However, the defendant's amended answer clearly raises this claim.

In consideration of the competing memoranda, this court finds sufficient support for defendant's motion to amend the Judgment entered by this court on June 13, 1991. The courts seek to prevent unjust enrichment "where the granting of the injunction benefited the plaintiff materially or financially at the expense of defendant by using or prohibiting the use of the subject of the action while the injunction was extant." *Gross v. Shields*, 496 N.Y.S.2d 894, 896-97 (N.Y.Sup.Ct. 1985). Plaintiffs "cannot be allowed to retain the advantages of a possession of premises which they would have been required to surrender to defendant, if plaintiffs had left defendant free to act." *Alloyd Gen. Corp. v. Building Leasing Corp.* 247 F.Supp. 922, 927 (D.Mass. 1965).

In the present case, the defendant will be entitled to reasonable use and occupancy while the plaintiffs were occupyingthe premises. Just as a landlord may recover reasonable rental value of premises

from a tenant for use and occupation thereof for the period of an injunctive order, *Bedell Co. v. Harris*, 240 N.Y.S. 555 (1st Dept. 1930), so too may the defendant here.

Defendant Norton is entitled to a supplemental judgment. A conference will be held Wednesday October 2, 1991 at 10:30 a.m. to fix a date for a hearing to determine the amount to be awarded.

SO ORDERED.

Dated: Hauppauge, New York
September 23, 1991

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX J — FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 4, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON, and the UNITED STATES OF AMERICA

Defendants.

FINAL ORDER

By letter dated May 31, 1991, defense counsel has advised the Court that the plaintiffs have not made the payment required by the order dated April 5, 1991.

Pursuant to that order, the Clerk is now directed (1) to vacate the present judgment, and (2) to enter judgment in favor of the defendant Jerome J. Norton and against the plaintiffs, dismissing their complaint, with costs to the defendant Jerome J. Norton, terminating all temporary restraining orders, and directing the United States of America to issue to the defendant Jerome J. Norton a good and satisfactory deed to the subject premises.

SO ORDERED.

Dated: Hauppauge, New York
June 4, 1991

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX K — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED APRIL 5, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

-against-

JEROME NORTON,

Defendant.

DECISION AND ORDER

Plaintiffs move by notice, supporting affidavit, exhibits, and memorandum dated February 12, 1991, for an order pursuant to Rule 59(e), Fed. R. Civ. P., altering and amending the partial judgment entered on January 31, 1991, by striking therefrom any portion applicable to interest from the date of redemption, and further, for an order staying the provision of the partial judgment requiring payment to be made by February 28, 1991, pending the determination of the present motion.

In particular, plaintiffs contend that their tender of the certified check in the amount of $151,250.00 to defendant on September 29, 1986, met the statutory requirements of 26 U.S.C. § 6337(b) for redemption of seized property and that defendant was in default when he did not accept such check. Based on this assertion, plaintiffs argue that the award to defendant of prejudgment interest should be stricken. In the alternative,

plaintiffs ask for a modification of the prejudgment interest award.

Defendant opposes by counsel's letter and supporting affidavit dated February 22, 1991, on the grounds that plaintiffs have raised no new argument or basis for reversal or modification of the partial judgment entered on January 31, 1991.

Plaintiffs' request for an order striking the award of prejudgment interest to defendant is denied. Plaintiffs' argument that the original tender of the certified check in the amount of $151,250.00 met the statutory requirements of 26 U.S.C. § 6337(b) for redemption of seized property was previously presented to both Judge McLaughlin and this Court and rejected. Both Judge McLaughlin and this Court determined that tender of the certified check in the amount of $151,250.00 to defendant on September 29, 1986, was insufficient to meet the statutory requirements of 26 U.S.C. § 6337(b) for redemption of seized property in that the check was deficient by $498.86. In light of this deficiency, both Judge McLaughlin and this Court held defendant's rejection of the tender to be proper.

However, because of the peculiar facts involved in this case, plaintiffs were given an additional opportunity to redeem their property. As compensation for being directed to surrender the subject property, it was determined that defendant was entitled to interest on the redemption price for the period of September 29, 1986, to January 17, 1991.

In federal question cases, absent statutory directive, district courts have the discretion to award prejudgment interest. *Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984). In the case at bar, the facts that led both Judge McLaughlin and this Court to find that

plaintiffs should be given an additional opportunity to redeem their property also led this Court to find that defendant was entitled to an award of prejudgment interest.

In the Decision and Order dated January 24, 1991, this prejudgment interest rate was fixed at fifteen (15%) percent per annum. However, upon review of the record as a whole, and in the interests of justice, it appears that this 15% rate of interest is excessive and should be modified. Therefore, the only question that need be addressed here is the determination of an appropriate interest rate.

District courts have the discretion to fix the rate at which prejudgment interest will accrue. *Cefali v. Buffalo Brass Co., Inc.*, 748 F. Supp. 1011, 1025 (W.D.N.Y. 1990). Further, awards of prejudgment interest "are governed by fundamental considerations of fairness." *Rolf v. Blyth, Eastman Dillion & Co., Inc.*, 637 F.2d 77, 87 (2d Cir. 1980) (citations omitted). Finally, "[a]warding prejudgment interest in accord with prevailing interest rates is consistent with prior case law." *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.) (citations omitted), *cert. denied*, 469 U.S. 1072 (1984).

Inasmuch as the fixing of the rate for prejudgment interest is left to the discretion of the Court and taking into account the prevailing interest rates for the period of time in question, this Court hereby modifies the prejudgment interest rate set in the Decision & Order dated January 24, 1991. The new rate is hereby fixed in a manner that reflects the corresponding average prime rate for each year throughout the period of time in question.[1]

---

1. Average Annual Prime Rates for the Years 1986 to 1991 (Reprinted from *Industry Week*, January 21, 1991, at p. 66.)

(Cont'd)

*Appendix K*

The amount plaintiffs owed on September 29, 1986, was previously determined to be $151,748.86. Computing simple interest thereon at the rates specified in footnote 1 from September 29, 1986, through January 17, 1991, the prejudgment interest amounts to $62,211.09 and, therefore, the amount owed as of January 17, 1991, is $213,959.95. For the period of time subsequent to January 17, 1991, plaintiffs will pay to defendant additional interest at the per diem rate of $38.46 per day.

In the Decision and Order dated January 24, 1991, plaintiffs were directed to make payment by February 28, 1991, to avoid entry of judgment in favor of defendant. In view of the foregoing, this period of time is hereby extended to May 30, 1991.

Upon delivery by the plaintiffs to the defendant of a certified check or cash equivalent for the sum of $213,959.95, plus any accrued per diem interest, defendant is directed to immediately deliver to the plaintiffs the certificate of sale of the subject property which he now holds.

---

(Cont'd)

| Year | Average Prime Rate | Interest* |
|---|---|---|
| 1986 | 8.33% | $3,255.41** |
| 1987 | 8.22% | $12,473.76 |
| 1988 | 9.32% | $14,142.99 |
| 1989 | 10.87% | $16,495.10 |
| 1990 | 10.01% | $15,190.06 |
| 1991 | 9.25%*** | $653.77**** |

* Interest on principal of $151,748.86.

** Interest earned for the period of 9/29/86 - 12/31/86.

*** Estimated average prime rate for first quarter of 1991.

**** Interest earned for the period of 1/1/91 - 1/17/91.

*Appendix K*

Should this payment not be made by May 30, 1991, upon notice to this Court and to the plaintiffs by the defendant, a further order will be issued directing the vacatur of the judgment and the entry of judgment in favor of defendant and against the plaintiffs, dismissing their complaint, terminating all temporary restraining orders, and directing that the United States of America issue a good and satisfactory deed to the subject premises to the said defendant.

SO ORDERED.

Dated: Hauppauge, New York
April 5, 1991

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.

## APPENDIX L — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 3, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 86-3369 (DFJ)

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and the UNITED STATES of AMERICA,

Defendants.

DECISION AND ORDER

Pursuant to stipulation of the parties, this case has been assigned to the undersigned magistrate for all purposes including trial, with any appeal from the judgment to be taken to the Court of Appeals. 28 U.S.C. Section 636(c)(1)(3).

Defendnt moves for summary judgment, by notice and notice of motion dated September 6, 1990, (a) to direct the entry of judgment in favor of the defendant, (b) to dismiss the plaintiffs' complaint, (c) to terminate all temporary restraining orders, (d) to direct the United States of America to issue a good and satisfactory deed to the defendant, and (e) to direct that an inquest be had as to damages which are demanded by the defendant.

*Appendix L*

Plaintiffs cross move, by notice dated October 2, 1990, for summary judgment (a) to direct the defendant to deliver up to the plaintiffs the Certificate of Sale for certain real property in exchange for the amount due for redemption, and (b) to direct that an inquest be had as to damages demanded by the plaintiffs.

This decision is based on the following papers:

| Docket Entry | Document |
|---|---|
| 50 | Defendants' Motion for Summary Judgment (September 6, 1990). |
| 51 | Defendants, Memorandum of Law in Support of Summary Judgment (September 6, 1990). |
| 52 | Defendants' Short Statement of Facts Pursuant to Rule 13(h) (September 6, 1990) |
| 53 | Defendants' List of Exhibits (September 6, 1990). |
| 54 | Plaintiffs' Cross Motion for Sumary Judgment, supporting affidavit and exhibits (October 2, 1990). |
| 55 | Plaintiffs' Memorandum of Law and attached exhibits (October 2, 1990). |
| 56 | Defendants' Reply Memorandum of Law (October 9, 1990). |

*Appendix L*

57 Defendants' Reply Affidavit and attached exhibits (October 9, 1990).

Statement of Facts

Plaintiffs, Richard and Susan Rosen, are owners of real propertylocated in Nassau County, New York. Pursuant to Title 26 U.S.C. Section 6331 of the Internal Revenue Code, plaintiffs' property was seized by the federal government for nonpayment of past-due federal income taxes. On April 1, 1986, plaintiffs obtained approval of their application for an adjustable mortgage loan from Fidelity New York Bank (FNYB) in the amount of $187,500. On April 2, 1986, the Internal Revenue Service (IRS) sold plaintiffs' property to defendant Jerome J. Norton (Norton), at a public auction for $137,500, pursuant to Title 26 U.S.C. § 6335. Norton received a certificate of sale which was subject to the plaintiffs' right to redeem the property under Title 26 U.S.C. § 6337.

On September 9, 1986, plaintiffs were issued a certified bank check by FNYB payable to Norton, in the amount of $151,250. Upon plaintiffs' application, the IRS granted them a Conditional Commitment to Subordinate Federal Tax Lien on September 18, 1986.

By counsel's letter dated September 15, 1986, plaintiffs requested instructions from Norton as to the preferred method of payment. He responded by letter dated September 19, 1986, directing the plaintiffs to deliver the local bank check (payable to his order) to his home on September 29, 1986 at 11:00 a.m. Additionally, Norton indicated that he would deliver up the tax receipt upon the collection of the check.

Norton was notified by plaintiffs' counsel's letter dated

September 23, 1986, that the certified check, in the amount of $151,250, included the cost of the tax lien and any interest required under the redemption statute. Norton did not respond at all.

On September 29, 1986 at approximately 11:09 a.m., plaintiffs' counsel and a title closer went to Norton's home to tender the certified check. Norton appeared at his front door with a stenographer. After formal introductions were made, the title closer displayed the check to Norton and attempted to complete tender. Norton refused to accept to accept tender without any explanation, and went back into his house. Plaintifs informed the IRS of the foregoing events, and thereafter, brought this action.

This case was originally assigned to Judge McLaughlin. Plantiffs and Norton cross-moved for summary judgment. Plaintiffs claimed that they had effectuated a valid redemption, asserting that their tender was timely and sufficient. Norton argued that the court lacked subject matter jurisdiction; that the plaintiffs incorrectly computed the interest on the purchase; and, that plaintiffs' tender of the certified check was insufficient because it was conditioned on Norton's transfer of the Certificate of Sale to the plaintiffs which would occur before Norton could collect payment on the check. By Order dated June 26, 1987, the Court denied the motions. It held that it had subject matter jurisdiction to hear the case under Title 28 § 1340; that while the plaintiffs incorrectly calculated the interest on the purchase, theirs was a good faith mistake which did not invalidate the redemption. However, the court found that a question of fact existed as to whether tender of the certified check was conditioned upon the transfer of the Certificate of Sale.

During the next three years, the parties actively participated in discovery before Magistrate Ross, who on May 31, 1990, returned

the case to Judge McLaughlin for trial. On July 26, 1990, this case was reassigned to Magistrate Jordan for trial, scheduled for the week of December 10, 1990. The parties again cross-move for summary judgment, plaintiffs claiming that their tender was timely and sufficient, and Norton arguing that the plaintiffs failed to properly tender payment under Title 26 U.S.C. § 6337.

Discussion

Summary judgment will be granted, "if the [documents] on file show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. R. Civ. P.

In a motion for summary judgment "[t]he burden falls on the moving party to establish that no relevant facts are in dispute.'" *Donovan v. Windsor Locks Board of Comm'rs.*, 834 F.2d 54, 57 (2d Cir. 1987). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party's burden is further enhanced by the fact that the district court "must draw all reasonable inferences *against* the moving party." *Donohue* 834 F.2d at 57 (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (emphasis added).

Evidentiary facts are required to support a motion for summary judgment. *Falls Riverway Realty, Inc. v. Niagara*, 754 F.2d 49, 57 (2d Cir. 1985). "The mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Summary judgment is hereby granted in favor of the plaintiffs and is denied as to Norton, without costs. Plaintiffs have

established that there are no genuine issues of material facts that will effect the outcome of the suit.

Norton argues that the plaintiffs failed to meet the requirements of 26 U.S.C. § 6337(b). The statute provides:

> (b) Redemption of real estate after sale.—
>
> (1) Period.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.
>
> (2) Price.—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

Title 26 U.S.C. § 6337(b) (1989).

A. Plaintiffs' Tender

Under the statute, the plaintiffs are required to tender payment to Norton within one-hundred eighty (180) days after the sale of

their property. It is clear that the plaintiffs timely tendered payment to the defendant.

By letter dated September 19, 1990, Norton instructed the plaintiffs to tender the check on the last day allowed under the redemption statute. Per his request, the plaintiffs timely arrived at his home, on September 29, 1990, and they faithfully undertook to redeem their property. Upon Norton's refusal to accept such tender, the plaintiffs' counsel notified an IRS representative to inform him of the foregoing events.

This was not, as Norton claims, an attempt to cure the unsuccessful tender to the defendant. Rather, this was the plaintiffs' way of seeking authoritative assistance as to their rights under the statute. The mere fact that Norton refused to accept tender without any kind of explanation, does not disavow the plaintiffs the right to seek help in redeeming their property in some manner.

B. Method of Payment

A tender of an amount due under the redemption statute must be made in cash, or by certified check, or in the cash equivalent. *Silver Bell Indus., Inc., v. United States of America, et al.*, 74-2 U.S.T.C. para. 9691, 34 AFTR 2d 74-5682 (D. Colo. 1974), aff'd, 76-1 U.S.T.C. para. 9432, 38 AFTR 2d 76-5171 (10th Cir. 1976). *See also Fitshugh v. Ryles*, 517 F. Supp. 1361, 1362 (1981). *See also* N.Y.U.C.C. § 3-411 (Consol. 1964) ("Certification of a check is acceptance; [w]here a holder procures certification the drawer and all prior indorsers are discharged."). It is clear that plaintiffs' tender of a certified check clearly satisfies the cash equivalent requirement under the statute.

*Appendix L*

C. Conditionality of Tender

Norton argues that the plaintiffs' tender was conditional and therefore does not constitute absolute payment. Although he correctly cites the applicable rule, which provides: "a tender is ineffectual as such where it is coupled with a condition that it be accepted in full payment, if the creditor in *good faith* claims that a larger amount is due, notwithstanding that it is ultimately held that the amount tendered was the correct amount." *United Gas Pipe Line Co. v. Tyler Gas Service Co.,* 162 F. Supp. 496 (E.D. Texas 1958) (emphasis added), Norton, however, fails to demonstrate that he acted in *good faith* in claiming that a larger amount was due at the time the plaintiffs' attempted tender. Norton was made aware by plaintiffs' counsel's letter dated September 23, 1986, that a check had been issued to his order for the incorrect amount. In addition, on September 29, 1986, Norton again had the opportunity to bring to the plaintiffs' attention the fact that there was an error as to the correct amount due and owing. In fact, the defendant never gave *any* reasons for refusing the plaintiffs' tender. Had Norton been acting in good faith, he would have notified the plaintiffs of the discrepancy between the amounts they believed were due him and the amount he believed was due him. Then and only then, if the plaintiffs failed to pay the additional amount, would Norton be able to invoke this argument. Consequently, since Norton's actions amounted to bad faith, Norton may not rely on this argument.

D. Conditionality of Payment

Although defendant correctly argues that the plaintiffs' tender is deficient by $498.86, this will not preclude the plaintifs from redeeming their property.

Before January 1, 1983, the Internal Revenue Service required

that simple statutory interest be calculated on unpaid taxes; after December 31, 1982, the Internal Revenue Code requires that all interest on tax deficiencies be compounded daily. *Purer v. United States,* 872 F.2d 277 (9th Cir. 1989). *See also* 47B C.J.S. *Internal Revenue* § 1142. The relevant statutory provision provides: "[i]n computing the amount of any interest required to be paid under this title . . . by the Secretary or by the taxpayer, or any other amount determined by reference to such amount of interest, such interest and such amount shall be compounded daily." Title 26 U.S.C. § 6622(a) (1989).

The redemption statute permits the owner of the seized property to redeem their property "upon payment to the purchaser . . . the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum." Title 26 U.S.C. § 6337(a). The plaintiffs mistakenly calculated simple statutory interest, instead of calculating interest as required under § 6622. This resulted in an underpayment of $498.86 to the defendant. Norton argues that such a deficiency should preclude the plaintiffs from redeeming their property.

As far back as 1870, the Supreme Court stated that "[c]ourts should give to statutes authorizing redemption from tax sales, a construction favorable to owners." *Corbett v. Nutt,* 77 U.S. (10 Wall.) 464, at 474-75, 19 L.Ed. 976 (1870). This general principle applies equally today. *See, e.g., Rosen v. Norton,* No. 86-3369, slip op. at 5-6 (E.D.N.Y. June 26, 1987) (court held that "it is proper to invoke the 'general rule . . . of leniency to the owner' in a action to redeem real property") (quoting *Anselmo v. James,* 449 F. Supp. 922, 925 (D. Mass 1978) (dictum)); *United States v. Lowe,* 268 F. Supp. 190, 192 (N.D. Ga. 1966) (the general rule is one of leniency to the owner).

*Appendix L*

It follows from this rule that the plaintiffs' failure to comply with the literal meaning of § 6337(b)(2) does not invalidate their attempted redemption. The plaintiffs were willing to pay $13,750 in interest to redeem their property. They indicated, by letter dated September 23, 1990, that the certified check in the amount of $151,250 was all inclusive. Norton failed to object in any manner either by prior to or at the time of tender. Therefore, plaintiffs' underpayment will not preclude them from redeeming their property and the rule of leniency will apply.

Conclusion

The parties are directed to submit to this Court by December 17, 1990, their calculations of the accrued interest on the purchase of the property in question, from April 2, 1986, to January 17, 1991. Upon the Court's determination of the amount of interest due Norton, the plaintiffs are directed to deliver to Norton by that date, a certified check or cash equivalent in the amount of the purchase price plus the accrued interest. Norton is directed to thereupon deliver up to the plaintiffs the Certificate of Sale for the property.

SO ORDERED.

Dated: Hauppauge, New York
December 3, 1990

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.

## APPENDIX M —MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JUNE 26, 1987

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

86 CV 3369

RICHARD AND SUSAN ROSEN

Plaintiffs,

JEROME J. NORTON; UNITED STATES OF AMERICA; and JOHN J. JENNINGS, as the District Director for the INTERNAL REVENUE SERVICE,

Defendants.

MEMORANDUM AND ORDER

McLAUGHLIN, District Judge

In this action brought to redeem real property, defendant Jerome J. Norton ("Norton") moves to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Plaintiffs and Norton cross-move for summary judgment. Fed. R. Civ. P. 56.

FACTS

The relevant, undisputed facts are as follows. Plaintiffs Richard and Susan Rosen ("Rosens") own land located in Nassau County, New York. Subsequent to the Rosens' failure to meet payment obligations on past-due taxes, the Internal Revenue Service ("IRS") acquired a federal tax lien on this property. On

*Appendix M*

April 2, 1986, the IRS sold the tax lien, subject to a first mortgage of $40,008.30, to Norton for $137,500.00. Norton obtained a certificate of sale.

Upon plaintiffs' application, the IRS granted them a Conditional Commitment to Subordinate Federal Tax Lien on September 18, 1986. Plaintiffs obtained a certified bank check payable to Norton in the amount of $151,250.00. Pursuant to Norton's instructions, plaintiffs' agents went to his home on September 29 and tendered the check. He refused to accept it.

Plaintiffs then brought this action, arguing that their tender was timely and sufficient. They demand equitable relief in the form of (1) cancellation of the certificate of sale issued to Norton; (2) an order to the IRS to issue the subordination; and 3) orders to Norton to accept sums tendered and to surrender the certificate of sale. In addition, plaintiffs demand damages of $250,000.00.

Norton argues that plaintiffs are not entitled to relief for three reasons. First, he asserts that the Court does not have subject matter jurisdiction over this case. Second, he argues that the amount tendered by the Rosens' was insufficient because interest on the purchase was incorrectly compounded annually instead of daily. Third, Norton argues that the Rosens' tender was insufficient because it was conditioned on Norton's transfer of the certificate of sale to the Rosens.

## DISCUSSION

### I. Subject Matter Jurisdiction

Plaintiffs bring this action under 26 U.S.C. § 6337(b). Relief is requested pursuant to this federal statute, and the Court is called

upon to construe its provisions and other provisions of the Internal Revenue Code. The Court thus has subject matter jurisdiction to hear this case under 28 U.S.C. § 1340.

II. Sufficiency of Tender

26 U.S.C. § 6337(b) provides:

> (b) Redemption of real estate after sale.—
>
> (1) Period.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.
>
> (2) Price.—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary or his delegate, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

In this case, the time period prescribed in § 6337(b)(1) was complied with. Norton contends, however, that tender was inadequate.

*Appendix M*

A. Interest Rate Calculation

First, Norton argues that the correct redemption payment amount is the purchase price plus 20% interest compounded daily. He thus calculates the proper redemption figure to be $151,748.86, which is $498.86 more than plaintiffs tendered. Norton argues that, in the absence of literal compliance with § 6337(b)(2), there was no redemption.

The relevant statutory provision, 26 U.S.C. § 6622(a), provides:

> In computing the amount of any interest required to be paid under this title . . . by the Secretary or by the taxpayer, or any other amount determined by reference to such amount of interest, such interest and such amount shall be compounded daily.

The Rosens argue that they are not "taxpayers" within the meaning of this statute because § 6337(b)(1) characterizes then as "owners of real property," and because they do not stand as taxpayers in relation to Norton. Norton, not suprisingly, disagrees, arguing that the Rosens are taxpayers within the meaning of 26 U.S.C. § 7701(a)(14), which provides: "The term 'taxpayer' means any person subject to any internal revenue tax."

Although it is a close question, the court is persuaded that § 6622 should be read broadly, and that it applies to all interest calculations under the Internal Revenue Code, including interest owned under § 6337(b). This view accords with that of the Commissioner of Internal Revenue. *See* Rev. Rul. 83-7, 1983-1

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C.B. 583, 584 (§ 6622 applies to "*any other amount of interest required to be* paid under the [Internal Revenue] Code') (emphasis added). Plaintiffs' tender of $151,250.00 was thus deficient by $498.86.

It does not necessarily follow, however, that the deficiency voids the redemption. First, the amount of the deficiency is miniscule in comparison to the interest owed by the Rosens, let alone the sum that they tendered. Second, the underpayment was based the Rosens' mistaken, but good faith, belief that interest was to be compounded annually. Based on the foregoing, the Court concludes that in this case it is proper to invoke the "general rule . . . of leniency to the owner" in an action to redeem real property. *Anselmo v. James*, 449 F. Supp. 922, 925 (D. Mass. 1978) (dictum). Accordingly, the Court holds that plaintiffs' failure to comply literally with § 6337(b)(2) does not invalidate the attempted redemption.

B. Conditionality of Payment

Under § 6337(b) redemption of property is permitted upon "payment to the purchaser" of the proper amount. Norton does not contest that the bank check tendered by the Rosens was a sufficient instrument of payment. Instead he asserts that plaintiffs' agents demanded transfer of the certificate of sale upon their tender of the bank check. Norton asserts that because he could not collect payment on the bank check until later, the transfer of the certificate of sale became a condition precedent to payment, in violation of § 6337(b), which requires unconditional tender. The Rosens assert that their agents tendered the bank check unconditionally and that Norton refused to accept it.

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Whether tender of the check was conditioned upon transfer of the certificate of sale presents the Court with a relevant question of fact that may be resolved only after an evidentiary hearing. Accordingly, the parties are directed to contact the Court in order to schedule such a hearing.

SO ORDERED.

Dated: Brooklyn, New York
June 26, 1987

s/ Joseph M. McLaughlin
JOSEPH M. McLAUGHLIN, U.S.D.J.

The Clerk shall make copies of this Order and shall serve them upon the parties.

## APPENDIX N — INTERNAL REVENUE SERVICE FORM 2435 – CERTIFICATE OF SALE OF SEIZED PROPERTY

**Form 2435**
**(Rev. September 1982)**

**Department of the Treasury - Internal Revenue Service**

**CERTIFICATE OF SALE OF SEIZED PROPERTY**

I certify that I sold at public sale the property described below, seized for nonpayment of delinquent internal revenue taxes due from

Taxpayer's name:
*Richard & Susan Rosen*
*67 Hidden Ridge Dr.*
*Syosset, N.Y. 11791*

Sale held at:
*114 Old Country Rd.*
*Mineola, N.Y. 11501*

In the county of:
*Nassau*

Date of Sale:
*April 2, 1986*

Description of property sold:

*All that certain plot, piece or parcel of land, situate, lying and being at Syosset, Town of Oyster Bay, County of Nassau and State of New York, bounded and described as follows:*
*BEGINNING at a point on the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed) which point is where the northerly line of Map of Hidden Ridge at Syosset Condominium filed January 17, 1980, Case No. CA-52 intersects the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed);*
*RUNNING THENCE along said last mentioned map line the following (3) courses and distances:*
*1) South 89 degrees 00 minutes 00 seconds West, 251.69 feet;*

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*2) North 16 degrees 30 minutes 00 seconds West, 120.76 feet;*
*3) South 73 degrees 30 minutes 00 seconds West, 319.00 feet to the land now or formerly of Frank B. and Alice H. Weber;*
*THENCE North 65 degrees 16 minutes 40 seconds West along the land now or formerly of Frank B. and Alice H. Weber and land now or formerly of Jerome B. and Elaine R. Stein a distance of 68.23 feet to land on Map of Syosset Park Inc. filed April 15, 1937, Map No. 3775;*
*THENCE along said last mentioned land following (4) courses and distances;*
*1) North 22 degrees 43 minutes 20 seconds East, 112.00 feet;*
*2) North 8 degrees 03 minutes 12 seconds East 298.59 feet;*
*3) North 13 degrees 43 minutes 12 seconds East, 240.30 feet;*
*4) North 4 degrees 58 minutes 48 seconds West, 33.75 feet to other land of Hidden Ridge Associates;*
*THENCE along said last mentioned land, North 87 degrees 20 minutes 00 seconds East, 631.61 feet to the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed);*
*THENCE Southerly along the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed) on a curve bearing to the right having a radius of 4970.00 feet, a distance of 22.12 feet to land of the Home Owners Association (Parcel "C").*
*THENCE along the said land of the Home Owners Association the following (3) course and distance;*
*1) North 81 degrees 05 minutes 00 seconds West, 61.74 feet;*
*2) South 8 degree 55 minutes 00 seconds West, 124.00 feet;*
*3) South 81 degrees 05 minutes 00 seconds East, 62.00 feet to the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed)*
*THENCE South 8 degrees 55 minutes 00 seconds West, along the westerly side of Seaford-Oyster Bay Expressway Service Road (proposed), 607.63 feet, to the point or place of BEGINNING.*

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**The above property was sold at the highest bid received, and receipt of the bid amount is acknowledged. The sale was conducted as provided by Subchapter D, Chapter 64, of the Internal Revenue Code and related regulations.**

Sale amount: *$137,500.00* Purchaser's name: *Jerome J. Norton*

Purchaser's address: *220 Summit Way Syosset, N.Y. 11791*

Revenue Officer's Signature:
*s/ illegible*

District:
*Brooklyn*

Revenue Officer's Address:
*114 Old Country Rd. Mineola, N.Y. 11501*

Date:
*May 1, 1986*

*Appendix N*

## NOTICE TO PURCHASER OR PURCHASER'S ASSIGNEE

Personal Property

This certificate transfers to the purchaser all right, title, and interest of the taxpayer in and to the personal property described.

Real Property

If the real property is not redeemed within the time prescribed in section 6337 of the Internal Revenue Code, a deed will be issued as soon as possible after the surrender of this certificate. The deed will convey the right, title, and interest of the taxpayer in and to the real property. Instructions for obtaining a deed are given below.

Redemption Rights

The rights of redemption of real estate after sale, as specified in Code section 6337(b), are quoted below

(b) Redemption of Real Estate After Sale.

(1) Period.—The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) Price.—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

How to Obtain a Deed

If the real estate is not redeemed within the 180-day period, the

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purchaser or assignee may obtain a deed by surrendering this certificate of sale, either by personal delivery or mail, to:

1) The District Director of Internal Revenue for the district in which the property is located, marked for the Attention, Chief Special Procedures; or

2) The address of the Internal Revenue Service office shown on the front of this certificate.

## APPENDIX O — RELEVANT STATUTES INVOLVED

### § 6335. Sale of seized property.

**(a) Notice of seizure.**—As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

**(b) Notice of sale.**—The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

**(c) Sale of indivisible property.**—If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount o f the tax and expenses, the whole of such property shall be sold.

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**(d) Time and place of sale.**—The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

**(e) Manner and conditions of sale.—**

**(1) Minimum price.**—Before the sale the Secretary shall determine a minimum price for which the property shall be sold, and if no person offers for such property at the sale the amount of the minimum price, the property shall be declared to be purchased at such price for the United States; otherwise the property shall be declared to be sold to the highest bidder. In determining the minimum price, the Secretary shall take into account the expense of making the levy and sale.

**(2) Additional rules applicable to sale.**—The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

**(A)** That the sale shall not be conducted in any manner other than—

**(i)** by public auction, or

**(ii)** by public sale under sealed bids.

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(B) In the case of the seizue of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) **Payment of amount bid.**—If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or in the discretion of the Secretary, the sale may be declared by the

to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever, and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

**(f) Stay of sale of seized property pending tax court decision.—**

**For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).**

(Aug. 16, 1954, c. 736, 68A Stat. 785; Nov. 2, 1966, Pub. L. 89-719, Title I, § 104(d), 80 Stat. 1137; Oct. 4, 1976, Pub. L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834.)

**§ 6337. Redemption of property**

**(a) Before sale.**—Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

**(b) Redemption of real estate after sale.—**

**(1) Period.**—The owners of any real property sold as provided in section 6335, their heirs, executors, or

administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) **Price.**—Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) **Record.** —When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

(Aug. 16, 1954, c. 736, 68A Stat. 787; Nov. 2, 1966, Pub. L. 89-719, Title I, § 104(e), 80 Stat. 1137; Oct. 4, 1976, Pub. L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834; Sept. 3, 1982, Pub. L. 97-248, Title III, § 349A(a), 96 Stat. 639.)

**§ 6338. Certificate of sale; deed of real property**

(a) Certificate of sale.—In the case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

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**(b) Deed to real property.**—In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

**(c) Real property purchased by United States.**—If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

(Aug. 16, 1954, c. 736, 68A Stat. 787; Sept. 2, 1958, Pub. L. 85-866, Title I, § 78, 72 Stat. 1662; Nov. 2, 1966, Pub. L. 89-719, Title I, § 104(f), 80 Stat. 1137; Oct. 4, 1976, Pub. L. 94-455, Title XIX, § 1906(b)(13)(A), 90 Stat. 1834.)

**§ 6340. Records of sale**

**(a) Requirement.**—The Secretary shall, for each internal revenue district, keep a record of all sales of real property under section 6335 and of redemptions of such property. The record shall set forth the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making such sale, the amount of expenses, the names of the purchasers, and the date of the deed.

**(b) Copy as evidence.**—A copy of such record, or any part thereof, certified by the Secretary shall be evidence in any court of

the truth of the facts therein stated.

(Aug. 16, 1954, c. 736, 68A Stat. 789; Oct. 4, 1976, Pub L. 94-455, Title XIX, § 1906(b) (13) (A), 90 Stat. 1834.)

**§ 6343. Authority to release levy and return property**

**(a) Release of levy.**—It shall be lawful for the Secretary, under regulations prescribed by the Secretary, to release the levy upon all or part of the property or rights to property levied upon where the Secretary determines that such action will facilitate the collection of the liability, but such release shall not operate to prevent any subsequent levy.

**(b) Return of property.**—If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from the sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the

United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) **Interest.**—Interest shall be allowed and paid at an annual rate established under section 6621—

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2) in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

(Aug. 16, 1954, c. 736, 68 A Stat. 789; Nov. 2, 1966, Pub. L. 89-719, Title I, § 104(i), 80 Stat. 1138; Oct. 4, 1976, Pub. L. 94-455, Title XIX, § 1906(b) (13) (A), 90 Stat. 1834; Pub. L. 96-167, § 4(a), Dec. 29, 1979, 93 Stat. 1276.)

**§ 6622. Interest compounded daily**

(a) **General rule.**—In computing the amount of any interest required to be paid under this title or sections 1961(c)(1) or 2411 of title 28, United States Code, by the Secretary or by the taxpayer, or any other amount determined by reference to such amount of interest, such interest and such amount shall be compounded daily.

(b) **Exception for penalty for failure to file estimated tax.**—Subsection (a) shall not apply for purposes of computing the

amount of any addition to tax under section 6654 or 6655.

(Added Pub. L. 97-248, Title III, § 344(a), Sept. 3, 1982, 96 Stat. 635.)

**Editorial Notes**

**Effective Date.** Section 344(c) of Pub. L. 97-248 provided that: "The amendments made by this section [enacting this section and amending section 6601 of this title] shall apply to interest accruing after December 31, 1982."

Supreme Court U.S.
FILED
JAN 19 1993
OFFICE OF THE CLERK

No. 92-1100

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

JEROME J. NORTON,

*Petitioner,*

—v.—

RICHARD ROSEN AND SUSAN ROSEN and
THE UNITED STATES OF AMERICA,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID I. ROSENBERG
*Attorney for Respondents*
*Richard Rosen and Susan Rosen*
666 Old Country Road
Garden City, New York 11530
(516) 228-6666

## QUESTIONS PRESENTED

Did the Court below properly compute the interest to be paid by taxpayers seeking to redeem their property from a tax sale purchaser in holding that interest accrues on the amounts paid by the tax sale purchaser from the dates of each such payment at twenty (20%) compounded daily as set forth in 26 U.S.C. §6337(b)?

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## STATEMENT OF FACTS

### Background

Respondents, the Rosens, own and reside in a condominium located in Nassau County, New York. The Internal Revenue Services ("IRS") acquired a federal tax lien on their property subject to a then existing first mortgage of $40,008.00. The original amount of the lien was $156,446.34.

### The Tax Sale

On April 2, 1986, the tax lien was sold to the petitioner Norton for $137,500.00. Norton paid $30,000.00 of the purchase price for the lien on April 2, 1986. On April 22, 1986, Norton paid an additional $16,000.00. The balance of $91,500.00 was paid on either April 28,

1986 (according to Norton) or May 1, 1986 (according to the IRS).

The certificate of sale was issued to Norton on May 1, 1986.

**The Redemption**

The Internal Revenue Code ("IRC") provides that a taxpayer has a right to redeem his property from the sale of a tax lien if, within 180 days of the sale (September 29, 1986), the taxpayer pays to the purchaser the amount paid by the purchaser for such lien together with interest thereon at the rate of twenty (20%) percent per annum.[1] 26 U.S.C. §6337(b).

Prior to the tax sale, the Rosens had received a mortgage commitment from

---

[1] Effective January 1, 1983, 26 U.S.C. §6622 provides that any interest accruing under the IRC shall be compounded daily.

Fidelity New York to refinance their existing mortgage and obtain a new loan for $187,500.00. The commitment was subject to the subordination of the federal tax lien. An application was made to the IRS for a subordination certificate to subordinate the balance of the tax lien remaining after the sale to Norton. This would insure the mortgagee a first lien on the property. On September 18, 1986, the IRS issued a Conditional Commitment to Subordinate Federal Tax Lien to the mortgagee's counsel. The Certificate states, in part:

> Based on the information furnished, I have determined that the issuance of the certificate will increase the amount the United States may realize.
>
> I will withhold issuance of a certificate of subordination, however, until the taxpayers redeem the real property ... I will, on proper showing of the transferred certificate of sale,

> issue a certificate subordinating the Federal Tax lien outstanding against the taxpayers to the $187,500.00 mortgage issued by Fidelity New York. The last day the property may be redeemed is September 29, 1986.

A closing on the mortgage refinancing was held on September 22, 1986. At that time, based upon a good faith calculation of interest, a **certified bank check** payable to Jerome J. Norton in the amount of **$151,250.00** was issued from the mortgage proceeds. (1sa).

On September 15, 1986, the Rosens' counsel wrote to Mr. Norton:

> They [Mr. and Mrs. Rosen] are prepared to make payment on September 25th, 26th or 29th, 1986.
>
> We would request that you contact the undersigned as to whether you would prefer to pick up the check or have it delivered to your home. We would ask that you deliver back the tax lien receipt given to you by the Internal Revenue

> Service as such return is required by the Government.
>
> In the event you would like your attorney to pick up the check for you, we will reimburse you for your attorney's expense.
>
> In the event we are unable to tender the payment to you by noon on September 29th, 1986, we will tender such payment to the Government as permitted by law.
>
> Please call me so we can arrange whatever payment method would be most convenient to you. (2sa)

Norton responded on September 19, 1986:

> With respect to yours of September 15, 1986, you may deliver the requisite local bank check (payable to my order and not to a third party and endorsed to me ) to me at my home located at 220 Summit Way, Syosset, New York on September 29, 1986 at 11:00 a.m. (4sa)

On September 23, 1986, Rosens' counsel again wrote to Norton advising him of the amount of the cashier's check and requesting an earlier tender:

> I am in receipt of yours of 9-19-86. A check was issued to your order on 9-22-86 by Fidelity New York Bank in the amount of $151,250.00 which represents six months interest and the amount of the tax lien.
>
> As interest for the full six months is already included, we would appreciate your cooperation in permitting us to deliver your check sooner than Sept. 29th.
>
> Thank you. (5sa)

Norton refused.

On September 29, 1986, Rosens' counsel and a representative of the title insurance company arrived at Norton's home at the agreed time. The certified bank check was tendered to Norton. Norton stated "I refuse the tender" and closed the door.

Thereafter, still on September 29, 1986, Rosen's counsel wrote to the IRS with an affidavit of the title closer. The letter stated:

> I wish to confirm that the title company is currently holding the bank check payable to Mr. Norton. Pursuant to your directions, after your discussion with Government attorneys, we have made no formal tender of this check to the Internal Revenue Service. You stated to us on Friday, September 26, that the attorneys stated that the holding of the check by the title company is deemed sufficient and therefore no tender would be necessary. Please be advised that we are ready, willing and able to make the tender to the Internal Revenue Service, if necessary.

Thereafter, this action commenced seeking a judgment compelling Norton to accept the redemption and an injunction against delivery of the deed to the premises to Norton.

The certified bank check still remains with the title company for the benefit of Norton. The Rosens have paid principal and interest payments to Fidelity on the refinanced mortgage of $187,500.00 since the closing.

**The Proceedings Below**

The District Court (McLaughlin, J.), upon plaintiffs' application for a preliminary injunction and defendant Norton's cross-motion for summary judgment found that the Rosens had inadvertently, and in good faith, miscalculated the interest at twenty (20%) percent compounded annually, not daily. This calculation resulted in a deficiency of $498.86 when compared to the interest compounded daily from April 2, 1986 (the date of the tax sale). The Court stated:

> It does not necessarily follow, however, that the deficiency voids the redemption. First, the amount of the deficiency is minuscule in comparison to the interest owed by the Rosens, let alone the sum that they tendered. Second, the underpayment was based [sic] the Rosens' mistaken, but good faith, belief that interest was to be compounded annually. Based on the foregoing, the

> Court concludes that in this case it is proper to invoke the "general rule . . . of leniency to the owner" in an action to redeem real property. Anselmo v. James, 449 F. Supp. 922, 925 (D. Mass. 1978) (dictum). Accordingly, the Court holds that plaintiffs' failure to comply literally with §6337(b)(2) does not invalidate the attempted redemption. (Petition; 49a at 53a)

The Court then found a question of fact as to whether the request for the receipt of the tax sale certificate at the time of the tender was an improper condition.

Thereafter, the Court, on motions for summary judgment by each party, granted Rosens summary judgment and found:[2]

(i) the certified check was a proper method of payment;

---

[2] The parties consented to a reference of the action for all purposes to a Magistrate Judge. 28 U.S.C. §636(c).

(ii) Norton did not act in good faith since he was aware of the amount of the check since September 23, 1986 and failed to object thereto in any manner;

(iii) Norton could not claim, therefore, that the tender was conditioned; and

(iv) the inadvertent miscalculation based upon the language of the 26 U.S.C. §6337(a) without regard to the amended 26 U.S.C. §6622 (providing that interest be compounded daily) would not preclude the redemption in light of the "general rule of leniency" and the construction of tax statutes favorable to owners.

However, on January 24, 1991, the District Court, inconsistent with Judge McLaughlin's original order and contrary to its prior findings, found:

(i) the tender was insufficient;

(ii) strict compliance with the statute was required;

(iii) interest is due to the date of actual redemption;

(iv) the amount owed on September 29, 1986 with twenty (20%) interest compounded daily from the date of sale was deficient by $498.86; and

(v) Norton was due to fifteen (15%) percent simple interest on $151,748.86 from September 29, 1986 totalling $249,845.14 through the date of the Courts decision.[3] (6sa).

The Court gave the Rosens twenty-eight days to pay the money or, upon non-payment, summary judgment would be vacated and the complaint dismissed.

---

[3] The petition does not contain this Order.

The Rosens moved to alter the judgment claiming that the calculation of interest compounded daily at twenty (20%) percent per annum from the dates of payment by Norton of the purchase price for the tax sale certificate[4] resulted in an overpayment on September 29, 1986.[5]

The District Court (Jordan, M.J.) modified its order and reduced the post-tender interest rate to the average prime rate computed annually. This reduced the amount required to redeem the property to $213,959.95. Payment was not timely made and the Court vacated the summary judgment and dismissed the complaint.

---

[4]

| | |
|---|---|
| April 2, 1986 | $ 30,000.00 |
| April 22, 1986 | $ 16,000.00 |
| April 28, 1986 (or May 1, 1986) | $ 91,500.00 |
| | $137,500.00 |

[5] The Rosens had previously made this argument to Judge McLaughlin who did not address this issue in this Decision and Order.

Norton then moved to amend the judgment to obtain use and occupancy of the premises by plaintiff since September 29, 1986.

After a hearing, the Court amended the judgment to award Norton $84,035.65 for use and occupancy of the premises through January 1, 1992.

**The Decision Below**

On appeal, the Court below reversed. The Court stated:

> It is correct that the Rosens did not use the proper method of calculation, but their error in calculating the amount of the tender actually resulted in an overpayment, not a deficiency. The district court erred by calculating daily interest on the entire purchaser price from the date of sale (April 2, 1986), instead of from the date each payment was made to the IRS. Section 6337(b)(2) of Title 26 provides that the price of redemption is "the amount paid by such purchaser and interest thereon at the rate of

> 20 percent per annum". Plainly, the "amount paid" by Norton was $30,000 on April 2, 1986, $26,000 on April 16, 1986 and $91,500 on April 28, 1986, and it is only on these sums and from these dates that Norton was entitled to interest.
>
> The plain language of this section also comports with common sense. Since interest is "compensation for the use or forbearance of money", *Deputy v. du Pont*, 308 U.S. 488, 498 (1940), it would be anomalous to allow Norton to recoup compensation for monies not yet used. Norton therefore was entitled to daily interest on $30,000 for 180 days (April 2 to September 29), on $16,000 for 166 days (April 16 to September 29) and on $91,500 for 154 days (April 28 to September 29).

The matter was remanded with the direction to enter a judgment ordering Norton to accept the tender of the certified check for $151,250.00 delivered to the title company and to deliver the certificate of tax sale upon such tender.

The Court below denied rehearing and refused the suggestion for rehearing in banc.

## SUMMARY OF ARGUMENT

The Court of Appeals properly held that interest due to Norton to redeem their residence was only due from the date that Norton expended his funds to purchase the tax lien. The payment tendered, though mistakenly and inadvertently calculated using annual compounding of interest, was $1,064.00 in excess of the amount actually due.

Since there was a perfect tender by certified funds there was no "conditionality" of payment. Therefore, Norton's refusal of the tender was wrongful, abating all further interest.

Norton's refusal to deliver the tax sale certificate upon the tender was improper.

## ARGUMENT

### POINT I

### PETITIONER HAS NOT DEMONSTRATED SUFFICIENT CAUSE TO BE ENTITLED TO THE WRIT

The petitioner must demonstrate special and important reasons to obtain the writ sought. (Rule 10). These include a conflict among courts of appeal; that the decision sought to be reversed is in conflict with a state court of last resort, or is an extreme departure from usual judicial proceedings.

Petitioner claims the issues decided below are of extreme federal importance and seeks to demonstrate conflicts with other court findings.

No such conflict exists. The decision below simply interprets the plain language of 26 U.S.C. §6337(b) holding

that upon a redemption of property by a taxpayer, interest accrues from the date of payments of the purchase price paid by a tax lien purchaser.

The purported conflict with other courts does not exist or is not sufficient to mandate the issuance of the writ.

There is no dispute as to the rate of interest or to the timeliness of the tender. Regardless of a characterization of the interest as a penalty or compensation for the use of money, the result is the same based upon the statutory language. In either event, if the taxpayer is ready, willing and able to tender the proper amount, whether as a penalty or compensation for the use of the tax lien purchaser's money, if the proper

tender is made, redemption is automatic.[6]

Deputy v. du Pont, 308 U.S. 488 (1940) is not in conflict. Rather it is totally irrelevant to the issue herein. Therein, this Court decided whether expenses incurred in consideration of a shareholder borrowing stock which was repaid by the return of the shares and the amount of dividends declared plus taxes incurred by the lender were "ordinary and necessary" business expenses and therefore tax deductible by the borrower and taxpayer.

Similarly, P.R. De Bellis Enterprises, Inc. v. Lumberman's Mutual Casualty, Co., 77 N.J. 428 (1978) is irrelevant to the issue herein. Therein, the court found that the purchaser of a

---

[6] There is no windfall to the taxpayer. He is still paying twenty (20%) percent interest annually, compounded daily.

tax lien did have an insurable interest in the property such that it could purchase a fire insurance policy on the premises and, upon a fire, collect on the policy. The value of the interest insured, however, was not the fair market value of the premises or the value stated in the insurance application. The value was limited to the amount paid the insured when the tax lien was bought from the government. No discussion is set forth therein as to the computation of interest to be paid by a taxpayer seeking to redeem its property pursuant to 26 U.S.C. §6337(b).

Miller v. New Jersey Insurance Underwriting Association, 82 N.J. 594 (1980) cited by petitioner is similarly irrelevant. It holds that if a real estate tax is foreclosed without prior notice to the taxpayer (no attempt was

made by the taxing authority to mail the notice to the known taxpayer who continued to occupy the premises) and the redemption period has expired, the property owner still had an insurable interest in the property and, therefore, could collect under a fire policy after a loss occurred. There is no discussion of interest accruing under 26 U.S.C. §6337(b).

Bohler v. Calloway, 267 U.S. 479 (1925) is similarly miscited. Therein, the taxpayer tendered only a **portion** of the assessment he admitted was due and refused to pay the full amount. He demanded a full release and when he was refused, did not make **any** payment. Herein, Rosen tendered in excess of the full amount by certified bank check.

Accordingly, no conflict is shown nor is there shown an extreme departure from usual judicial proceedings.

Petitioner has failed to demonstrate sufficient cause for this Court to issue the writ requested.

## POINT II

## THE COURT BELOW PROPERLY COMPUTED THE INTEREST DUE

26 U.S.C. §6337(b) provides in relevant part:

> (1) Period. - The owners of any real property sold as provided in Section 6335 . . . . shall be permitted to redeem the property sold, . . . . at any time within 180 days after the sale thereof.
>
> (2) Price. - Such property . . shall be permitted to be redeemed upon payment to the purchaser . . . . the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum. (26 U.S.C. §6337(b) (emphasis added)

The amount "paid by such purchaser" is $30,000.00 on April 2, 1986; $16,000.00 on April 16, 1986; and $91,500.00 on April 28, 1986. The purchaser had deferred payment for thirty days pursuant to 26 U.S.C. §6335(e)(2)(D).

The argument urged by petitioner results in an effective rate of interest in excess of twenty (20%) percent on "the amount paid [by] purchaser" that is allowed by statute!

The following example illustrates this point: if an owner offered to redeem property sixty days after the tax sale and the tax lien purchaser had deferred payment for the full thirty days from the date of sale, interest calculated from the date of the tax sale would amount to almost forty (40%) percent! This could not have been the intention of Congress.

The notice of sale and 26 U.S.C. §6335(e)(2)(D) provide for up to one month to pay the purchase price but do not provide how interest should accrue on such installments.

In the absence of any clear statutory language or legislative intent, the Court

should construe the statute most favorable to the owner. Corbett v. Natt, 77 U.S. 464 (1870); Anselmo v. James, 449 F. Supp. 922 (D. Mass. 1978); U.S. v. Lowe, 268 F. Supp. 190 (N.D. Ga. 1966) aff'd sub nom Lowe v. Monk, 379 F.2d 555 (5th Cir. 1967).

"Courts have traditionally looked with favor upon redemption and have given liberal construction to redemption statutes". DiFoggio v. United States, 484 F. Supp. 233, 236 (N.D. Ill., 1979). "In the words of one court '[f]rom the earliest time this right [of redemption] has been clearly recognized and jealously guarded by United States Courts.'" (citations omitted). Rodriguez v. United States 629 F. Supp. 333, 342 (N.D. Ill. 1986).

In Guthrie v. Curnett, 417 F.2d 764 (10th Cir. 1969), the Court held that if

the purchaser of the tax lien wrongfully frustrated the owners' attempts at redemption, payment of the redemption price to the IRS agent was proper.

Herein, plaintiffs have continued to do everything possible to redeem their property. They applied for a mortgage to obtain the necessary funds; they obtained a subordination of the balance of the tax lien to the new mortgage from the IRS; they computed interest on the amount paid through September 29, 1986 as provided for in 26 U.S.C. §6337(b)(2); they requested an earlier tender and were denied; they made a complete tender and were refused; and they deposited the money with the title company and lost all claim or benefit to it.

Justice, equity and compassion require that a speculator, preying on the misfortune of others; who prevents a

tender until the final moments of the redemption period; who fails to notify the plaintiffs of any deficiency he believes existed when notified of the amount to be tendered; and who fails to explain his refusal so that any defect could be timely cured should not be rewarded.

In addition to the legal and equitable considerations, important policy considerations exist as well.

In issuing a commitment to subordinate its tax lien to the new refinanced mortgage, the District Director of the IRS stated:

> Based on the information furnished, I have determined that the issuance of the certificate will increase the amount the United States may realize.

The United States will realize a substantially greater amount because of the holding below. The balance of any

equity in the premises above the new mortgage is available for tax payments. If the Court reverses the judgment, the deed will be issued transferring title to Norton. This will extinguish such equity.

The tender being sufficient and the District Court having subsequently found that Norton's bad faith could not justify reliance on any condition of payment (6sa), the tender was in all respects proper and, therefore, effected a valid redemption.

## POINT III

### THE TENDER WAS REFUSED AT PETITIONER'S OWN RISK

Petitioner argues that if the amount is in dispute, he can refuse a tender and pursue a determination in a court of law as to the proper amount.[7]

The general rule is that the running of interest will be suspended if the debtor makes proper tender at the appointed time and place, even if such tender is refused. C.J.S. Interest and Usury §60, U.S. v. Eastern Airlines, Inc., 366 F.2d 316, 321 (2nd Cir. 1966) (where obligation to pay interest was suspended upon proper tender that was refused).

---

[7] Petitioner, below, argued the tender was conditional because it was made by a certified bank check. This argument is not presented in the petition.

In order for tender to be proper, it must be (1) for the full amount the purchaser is entitled to receive[8]; (2) made in due time and manner; and (3) unconditional. C.J.S. Taxation §877(a).

In addition to the above requirements, the debtor must also place the tender beyond his own use at the time of tender. C.J.S. Interest & Usury §61(b). Security-Connecticut Life Ins. Co. v. National Paragon Corp., 788 F.2d 139, 142 (3rd Cir. 1986). Deposit with a title company is sufficient to satisfy this requirement, thus suspending the running of interest. Covington v. Clark, 175 Cal. App.2d 449, 346 P.2d 229 (3d Dist. 1959) (wherein vendors were not entitled to interest as money was tendered

---

[8] "A small deficiency in the amount tendered for redemption from a tax sale, attributable to mistake, will not vitiate the tender . . ." C.J.S. Taxation §877, citing Mosser v. Moore, 49 S.E. 537 (1904).

to title company on date of closing for the purpose of tender).

Herein, the Rosens have met the three criteria for proper tender as set forth above: (1) the payment is either sufficient, or has been found to be valid despite the $498.86 deficiency, which the District Court found to be "minuscule"; (2) the Rosens' representatives were present at the appointed time and place for tender; and (3) the payment was unconditional and in proper form.

Furthermore, the Rosens placed the tendered money with Congressional Abstract, a title company, and have not had the use thereof since the date of tender. Thus, they have also met the second requirement for proper tender - that the money be placed beyond their use.

As the Rosens have done everything in their power to effect a redemption, the

accrual of additional interest cannot fall on them. C.J.S. Interest & Usury §58, citing Northerly Corp. v. Hermett Realty Corp., 19 A.D.2d 594, 240 N.Y.S.2d 709 (1st Dep't 1963).

The District Court found that Norton did not act in good faith by his refusal of the tender without explanation and by his failure to object to the amount to be tendered when he knew the actual amount of the check days earlier.

In Litwak v. Wolkenberg, 130 A.D.2d 630, 515 N.Y.S.2d 559, 560 (2d Dep't 1987), the Court stated:

> The defendants, having provided no basis for their refusal of the accurately computed tender, are thus not entitled to recover interest upon the principal from the plaintiffs for the period subsequent to the initial tender.

See Howe v. Allied Van Lines, Inc., 622 F.2d 1147, 1160 (3d Cir. 1980);

General American Life Ins. Co. v. Anderson, 156 F.2d 615, 626 (6th Cir. 1946).

Herein, the tender was made and refused. The funds were then deposited with the title company for the benefit of Norton pursuant to the instructions of the IRS.

In fact, the Rosens have been paying monthly mortgage payments of principal and interest to Fidelity on the mortgage they procured to obtain the funds for redemption.

Accordingly, the payment was sufficiently tendered in all respects and interest stopped accruing on September 29, 1986.

Norton had no right to refuse the tender and did so at his own risk.

Petitioner cites Murray v. United States, 686 F.2d 1320 (8th Cir. 1982)

cert. denied, 459 U.S. 1147 (1983) to show that the demand for the tax sale certificate upon payment was a condition and therefore improper.

Murray, id., is not authority for such position. Therein, the Court dismissed the action finding a lack of subject matter jurisdiction because 'there was no sufficient waiver of sovereign immunity by the government in the action that was pleaded therein.

In any event, the return of the tax sale certificate is required upon redemption, was required by the IRS in subordinating its lien to the new mortgage and was the consideration, not a condition, for the tender.

## CONCLUSION

The writ should be denied and the petition dismissed. There is no showing of any special or important reasons; there is no conflict with other courts of appeal or state courts of last resort; and on the merits, the opinion below was properly decided.

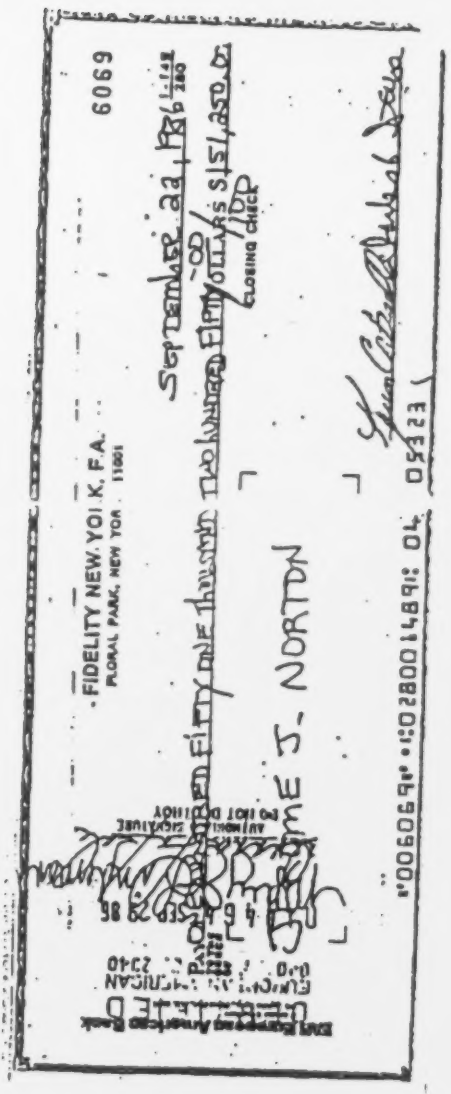
Respectfully submitted,

**DAVID I. ROSENBERG, ESQ.**
Attorney for Respondents
Richard Rosen & Susan Rosen
666 Old Country Road
Garden City, New York 11530
(516) 228-6666

Dated: Garden City, New York
January 19, 1993

# SUPPLEMENTAL APPENDIX

Supplemental Appendix A
Certified Check

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Supplemental Appendix B
Letter dated 9/15/86

KATZ & BERNSTEIN
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

September 15, 1986

Jerome Norton
220 Summitt Way
Syosset, New York 11791

Dear Mr. Norton:

We are writing to you as purchaser of a tax lien in the amount of $137, 500 on the home of Richard and Susan Rosen at 67 Hidden Ridge Drive Syosset, New York.

They are prepared to make payment on September 25th, 26th or 29th, 1986..

We would request that you contact the undersigned as to whether you would prefer to pick up the check or have it delivered to your home. We would ask that you deliver back the tax lien receipt given to you by the Internal Revenue Service as such return is required by the Government.

In the event you would like your attorney to pick up the check for you, we will reimburse you for your attorney's expense.

In the event we are unable to tender the payment to you by noon on September 29th, 1986, we will tender such payment to the Government as permitted by law.

Please call me so we can arrange whatever payment method would be most convenient to you.

Very truly yours,

KATZ & BERNSTEIN

S/

EDWIN A. BERNSTEIN

EAB:cb
REGISTERED MAIL
RETURN RECEIPT REQUESTED

REGULAR MAIL

Supplemental Appendix C
Letter dated 9/19/86

Jerome J. Norton
220 Summit Way
Syosset, New York 11791

September 19, 1986

Katz & Bernstein
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

ATT: EDWIN A. BERNSTEIN, ESQ.

Dear Mr. Bernstein:

With respect to yours of September 15, 1986, you may deliver the requisite local bank check (payable to my order and not to a third party and endorsed to me) to me at my home located at 220 Summit Way, Syosset, New York on September 29, 1986 at 11:00 a.m.

I shall deliver up the tax receipt upon collection of the check.

Yours truly,

S/

Jerome J. Norton

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P324 145 274

Supplemental Appendix D
Letter dated 9/23/86

KATZ & BERNSTEIN
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

9-23-86

Mr. Norton:

I am in receipt of yours of 9-19-86. A check was issued to your order on 9-22-86 by Fidelity New York Bank in the amount of $151,250 which represents six months interest and the amount of the tax lien.

As interest for the full six months is already included we would appreciate your cooperation in permitting us to deliver your check sooner than Sept. 29th.

Thank you.

S/ Ed Bernstein

My Home No. is
516 593 6708

Majestic Messenger

Supplemental Appendix E
Decision and Order dated 1/24/91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

Filed
1/24/91

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

CV 86-3369
(DFJ)

- against -

**DECISION**
**AND ORDER**

JEROME J. NORTON AND THE
UNITED STATES OF AMERICA,

Defendants.
----------x

Pursuant to the Decision and Order herein dated and filed December 3, 1990, defendant Jerome J. Norton has submitted his calculation of the amount of money necessary to redeem the subject property herein from the certificate of sale which he holds. The only response from the plaintiffs has been a Notice of Appeal from the denial of their demand for an inquest as to damages and from the award of additional interest to Mr. Norton.

The plaintiffs are not entitled to money damages.

First, their complaint contains a single cause of action invoking federal jurisdiction under 26 U.S.C. §6337(b) and 28 U.S.C. §2410. Neither statute provides for money damages. 28 U.S.C. §2410 provides a basis for federal jurisdiction in an action to quiet title to property on which the United States has a lien. U.S.C. §6337 provides a procedure for the redemption of property from a federal tax lien. There is no provision in either statute for the recovery of money damages. No known decided case supports such a claim. The decided cases appear to informally hold that upon timely and sufficient tender of the required amount, the owner is entitled to redeem his property. Nothing more.

Second, Courts have held that where, as here, an owner's right to redeem is a creature of statute, there can be no redemption absent strict compliance with the statute. See, e.g., Silver Bell Indus., Inc. v. United States, 74-2 U.S.T.C. para. 9691 (D. Colo. 1947), aff'd, 76-1 U.S.T.C. para. 9432 (10th Cir. 1976) (plaintiff's redemption held improper due to untimeliness in payment, use of personal check and inadequacy of tender in the amount of $32.98); Fitshugh v. Ryles, 517 F.Supp. 1361 (E.D. Ark. 1981) (plaintiff's tender of an "envelope draft" was held not to be an adequate method of payment): Anselmo v. James, 449 F. Supp. 922 (D. Mass. 1978) (court held that the federal courts are unable to extend time to redeem beyond the 180-day period).

In the case at bar, plaintiffs' tender was insufficient, as held by Judge McLaughlin and by this Court. Judge McLaughlin permitted it because it would be (sic) been inequitable otherwise, when one compared the amount still owed, $498.86, to the total amount actually due, $151,748.86. This Court also found that it would be inequitable to decide differently, because of the defendant's prior knowledge on September 23, 1986, of the amount to be tendered by the plaintiffs on September 29, 1986. See United Gas Pipe Line Co. v. Tyler Gas Service Co., 162 F. Supp. 496, 501 (E.D. Texas 1958). However, both courts correctly cited the fact that the plaintiffs were not in strict compliance statutorily, neither was the defendant in compliance equitably. It was based on

this reasoning that this Court granted plaintiffs' summary judgment motion, and not because they completely satisfied Section 6337.

In sum, the plaintiffs have been granted the equitable relief of being given an additional opportunity to redeem their property. They have not demonstrated any right to the legal remedy of money damages.

Further, Mr. Norton is entitled to interest to the date of actual redemption. The plaintiffs have had not only the use of the real estate, but also the use of this money.

Turning to the amount necessary to redeem the property, the amount calculated by the defendant is based upon the rate provided in the Internal Revenue Code. 26 U.S.C. 6331. However, that rate was no

longer applicable after the defendant defaulted by failure to deliver up the certificate of sale. Research has failed to disclose any federal rule governing the rate of interest to be applied after a default but before judgment. Accordingly, the applicable New York State Rule governs this case. In New York it is well settled that, after default, the rights of the parties are governed not by their agreement, but by the law. People ex rel Emigrant Savings Bank v. Sexton, 284 N.Y. 57, 62, 29 N.E.2d 469 (1940). Accordingly, Mr. Norton is entitled to prejudgment interest at the legal rate rather than Internal Revenue Code interest.

In federal question cases, absent statutory directive, the right of prejudgment interest is left to the

court's discretion. Orshan v. Macchiarola, 629 F.Supp. 1014, 1017 (E.D.N.Y., 1986) (Neaher, J.) and cases cited therein. In that case Judge Neaher looked to the prime interest rate for guidance in fixing the rate at which prejudgment interest should accrue. This appears to be sound for the reasons stated by him. In the present case, where prejudgment interest has been accruing for more than four years, application of the fluctuating prime rate is impractical. Inasmuch as the rate is left to the discretion of the court, it is fixed at fifteen (15%) percent per annum.

The parties agree that the amount tendered on September 29 1986, was $151,250.00, and that this amount was deficient by $498.86. Accordingly, the amount owed on that date was $151,748.86. Computing simple interest thereon at the

rate of 15% per annum from that date through January 17, 1991, the prejudgment interest amounts to $98,096.28 and the amount owed as of January 17, 1991, is $249,845.14.

Accordingly, the amount to be paid by the plaintiffs to Jerome J. Norton on or before January 17, 1991 is fixed at $249,845.14. The plaintiffs are also afforded the right to redeem the property by February 28, 1991, by paying additional interest at the per diem rate of $62.36 through the date of payment.

Upon the delivery by the plaintiffs Richard Rosen and Susan Rosen to the defendant Jerome J. Norton a certified check or cash equivalent for the sum of $249,845.14, plus any accrued per diem interest, Mr. Norton is directed to

immediately deliver up to the plaintiffs the certificate of sale of the subject property which he holds.

The Clerk is directed to enter judgment accordingly, with costs to the plaintiffs against the defendant Jerome J. Norton only.

Should this payment not be made by February 28, 1991, upon notice to the court and the plaintiffs by defendant Jerome J. Norton, a further order will be issued directing the vacatur of that judgment and the entry of judgment in favor of defendant Jerome J. Norton and against the plaintiffs dismissing their complaint, terminating all temporary restraining orders, and directing that the United States of America issue a good and

satisfactory deed to the subject premises to the said defendant Jerome J. Norton.

SO ORDERED.

Dated: Hauppauge, New York
January 24, 1991

S/

DAVID F. JORDAN, U.S.M.J.

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

No. 92-1100

In The

# Supreme Court of the United States

October Term, 1992

JEROME J. NORTON,

*Petitioner,*

*vs.*

RICHARD ROSEN AND SUSAN ROSEN and THE UNITED STATES OF AMERICA,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## REPLY BRIEF FOR PETITIONER

EDWIN L. WOLF
*Attorney for Petitioner*
131 Jericho Turnpike
Jericho, New York 11753
(516) 333-6622

3062
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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## PRELIMINARY STATEMENT

Jerome J. Norton ("Norton") respectfully submits this Reply Brief in response to the Brief for Richard Rosen and Susan Rosen ("Rosens"), hereinafter cited as ("B.O., p. __"). Norton's Petition will be cited as ("Pet., p. __").

This Brief is necessitated by Rosens' numerous misstatements of the facts and misreading of the cases.

## I.

## THERE IS NO ABSENCE OF CLEAR STATUTORY LANGUAGE OR LEGISLATIVE INTENT AS TO HOW INTEREST IS TO BE CALCULATED.

The Rosens claim that Norton's interpretation of the words "amount paid" is too favorable to a tax sale purchaser begs the question. The House and Senate Reports (*see* Pet., p. 11) U.S.C.A. 83rd Congress - Second Session, V. 3, House Report, p. 4133 and Senate Report, p. 4777, state that the intent of § 6335(e) is to encourage and induce the highest price possible. Obviously, a construction whereby interest is payable from the date of each installment rather than from the date of purchase would be counter-productive. It should be noted that using the example given by the Rosens (B.O., p. 24) the resultant interest payable by the Rosens would still be at the rate of 20% regardless of the rate of interest returnable to Norton.

The Rosens misinterpret the case of *P.R. DeBellis Enterprises Inc. v. Lumbermen's Mutual Casualty Company*, 77 N.J. 428 (1978) (B.O., p. 19). The court in *DeBellis* used § 6337[1] to

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1. Unless otherwise noted all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended.

determine the value of a tax sale purchaser's interest. The court held that the insured was entitled to recover the value of his interest in the property amounting to at least the amount expended at the tax sale plus interest. In *DeBellis*, the tax sale purchaser paid the price in two (2) installments and was allowed interest on the full purchase price from the date of the public sale. Thus, the court construed the words "the amount paid by such purchaser and interest thereon" under § 6337(b)(2) as being in the "singular" and not in the "plural" as opined by the Circuit Court in this case.

*Miller v. New Jersey Insurance Underwriting Association*, 82 N.J. 594 (1980) decided subsequent to *DeBellis* refers to *DeBellis* as the definitive case in New Jersey and holds that the interest of the tax sale purchaser is to be valued at the price paid for the property regardless of whether payment was made in a lump sum or installments.

It is noteworthy that the Rosens (B.O., p. 19) agree with Norton that the case of *Deputy v. DuPont*, 308 U.S. 488 (1940) does not support the conclusion of the Circuit Court.

## II.

## THE ROSENS WERE NOT MISLED BY SILENCE ON THE PART OF NORTON.

The Rosens claim to have been misled by Norton's acceptance of the Rosens' request to produce himself for redemption and then not advising them as to the correct amount is both belated and contrary to their initial claim that the amount tendered based on simple interest was the correct amount. Information as to the correct amount and its calculations was not exclusively within the knowledge of Norton and neither the Rosens, nor their attorney Edwin Bernstein ("Bernstein") nor the title closer, Christine deSaulles ("deSaulles"), ever requested verification of the amount

due. In fact, the uncontradicted notes of the witness, to the tender on September 29, 1986, Kathleen Hess, state that when Norton said he declined the tender, deSaulles and Bernstein each said "Thank you", turned and left before Norton and Kathleen Hess went into Norton's house and made no inquiry as to the basis of his declination (Supp. App., *infra* at 1a). The statements in Rosen's Brief (B.O., pp. 28, 32) that the District Court found that Norton did not act in good faith completely ignore the court's subsequent reversal on this aspect.[2] On the other hand, the uncontroverted evidence in the record shows that the Rosens did not certify the check[3] for $151,250.00, nor did deSaulles type her letter to Norton until September 29, 1986, the date of the defective tender. In his deposition before trial, Bernstein testified that the main purpose of his letters and telephone call to Norton antedating September 29, 1986, was to set a date for tender; and that the date of September 29, 1986 was selected and offered by Bernstein to Norton in a letter dated September 15, 1986, because at the time the Rosens could

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2. Initially, Magistrate Judge Jordan, while recognizing the overwhelming evidence of conditionality, overcame that aspect of the Rosens' tender by holding that Norton's non-disclosure of his reasons for rejection of tender constituted lack of "good faith" and therefore was "bad faith." Upon reargument, having been misled, Magistrate Judge Jordan altered his position and reversed himself and held that Norton's refusal of the tender was proper and thus not an act of "bad faith" (or lacking in "good faith") stating as follows: "Plaintiff's request for an order striking the award of pre-judgment interest to defendant is denied. Plaintiff's argument that the original tender of the certified check in the amount of $151,250.00 met the statutory requirements of seized property was previously presented to both Judge McLaughlin and this Court and rejected. Both Judge McLaughlin and this Court determined that the tender of the certified check . . . was insufficient to meet the statutory requirements . . . for redemption of seized property in that the check was deficient by $498.86. In the light of this deficiency, both Judge McLaughlin and this Court held that defendant's rejection of tender to be proper. . . ."

3. Rosens, below, argued that the check was a "bank" check which couldn't be "stopped." This argument appears to have been dropped.

not be sure when their arrangements to borrow would be concluded.

Assuming, however, an earlier date had been agreed upon, there remain three problems with the Rosens' arguments.

*The First Is That The Date Selected By Norton For Redemption Was Entirely Immaterial And Irrelevant.* At no time between 11:00 A.M. on September 29, 1986, when the defective tender was declined and midnight that day, did the Rosens ever offer to increase the amount tendered to make up for their shortfall. At no time subsequent to tender being declined, during the hours of 11:00 A.M. to midnight, did the Rosens: (a) ever inquire of Norton as to the amount he claimed due or the basis of his declination; or (b) make any effort to advise Norton they expected him to disclose his reasons. Since knowledge as to the amount due was not exclusively within the knowledge of Norton, he had no obligation to state the correct amount owing.[4]

*The Second Is That The Rosens Were Not Concerned With Whether Norton Accepted Or Declined the Tender* because they erroneously believed that they could make a valid substitute tender to the IRS In his deposition before trial, Bernstein, stated that he had determined, prior to contacting Norton and without any justifying basis for assuming that Norton would evade payment, that as an alternative to tendering payment to Norton, he would tender payment to the IRS. However, since Norton could be

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4. The cases of *Litwak v. Wolkenberg*, 130 A.D. 2d 630 (N.Y. App. Div., 2d Dept. 1987); *Howe v. Allied Van Lines, Inc.*, 622 F.2d 1147 (3rd Cir. 1980) and *General American Life Ins. Co. v. Anderson*, 156 F.2d 615 (6th Cir. 1946) cited by the Rosens (B.O., pp. 32, 33) are inapplicable to the case at bar and do not require that the tenderee, at the time of tender, make known the basis of the tenderee's rejection, as claimed by the Rosens. Rather, they stand for the proposition that the time of trial, the tenderee who has theretofore rejected the tender must provide adequate basis for his refusal or lose his right to interest from the date of tender.

"found" (and, was found) within the county in which the land to be redeemed was situated, the Rosens were not entitled to make a "back-door" tender to the IRS In *Silver Bell Industries Inc. v. United States et ano.*, 74-2 U.S.T.C. ¶9691 (D. Colo. 1947), *aff'd*, 76-1 U.S.T.C. ¶9432 (10th Cir. 1976), *cert. denied*, 429 U.S. 822 (1976), the Court held that tender to the IRS was available only where the owner cannot locate the purchaser.[5] The purported tender which the Rosens claim to have made by their letter to the IRS dated September 29, 1986, written immediately subsequent to Norton's declination, was and is totally invalid and of no force or effect. The letter from Bernstein to the IRS of September 29, 1986, could not constitute a tender because; (i) no monies were enclosed; (ii) there is no evidence that the Rosens had any monies other than those controlled by deSaulles to tender to the IRS.

*The Third Is That To Effect Tender, It Must Be Absolute And Unconditional.* In the beginning, common law required, to establish a debt, that there must be witnesses (*secta*). This was several hundred years later changed to consideration (*quid pro quo*). Here, Norton, as purchaser, had no need to establish the debt by witnesses or by consideration because the debt of the Rosens was admitted in writing.[6] Therefore, contrary to the Rosens' contention (B.O., p. 34), the demand by the Rosens for the Certificate of Sale ("Certificate") must be construed as the attachment of a condition precedent.

---

5. The case of *Guthrie v. Curnett*, 417 F.2d 764 (10th Cir. 1969) cited by the Rosens (B.O., p. 25) is distinguishable on its facts. In *Guthrie* the court found that the purchaser had deliberately made himself unavailable for "in personam" tender and that therefore the IRS was bound to accept substitute timely and sufficient tender. In the case at bar, Norton made himself available for "in personam" tender.

6. *Murray v. United States*, 686 F.2d 1320 (1982), *cert. denied*, 459 U.S. 1147 (1983) supports Norton's argument that the debt is not terminated by the tax sale and that the right of redemption is not a contract for the re-purchase of property.

A tender is ineffectual as such where it is coupled with a condition that it be accepted in full payment if the creditor, in good faith, believes that a larger amount is due, and this is so notwithstanding that it is ultimately held that the amount tendered was the correct amount. *United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 162 F. Supp. 496 (E.D. Texas 1958), citing *Bohler v. Callaway*, 267 U.S. 479 (1925). In *Bohler* this Court held that one is not relieved by tender of the amount finally determined as correct, if the tender is upon condition that it be received in full payment of the claim.

The rule, as stated in 52 Am. Juris. 232, is:

> But tender of an amount less than the creditor claims is due is not effectual where coupled with conditions which render its acceptance by the creditor as an admission that no greater amount is due. This rule applies as well where the tender is in fact of an amount in full of all claims as where it is not; whether or not the amount of money tendered is in full is a question that the creditor has a right to contest in every case.

The Rosens' defective tender of September 29, 1986, was not a strictly unconditional tender of the full amount owing in order to redeem that day. In deducting $498.86 from the amount of interest owing in the tender, the Rosens, in effect, made a compromise offer on their indebtedness. If Norton had accepted the tender, he would be deemed to have acquiesced in the compromise offer, and would have been thereafter precluded from contesting the Rosens' computation. Norton was not obligated by the redemption statute to forfeit his right to claim the difference.

In *Certified Corporation v. Market Center, Ltd.*, 452 P.2d 442

(1969), the Supreme Court of Hawaii, in affirming the Circuit Court's denial of tender, stated in that regard:

> Appellant's tender of November 1, 1965 was not an unconditional tender of the full amount owing on the note on that day. In deducting $2,390.40 in the tender, appellants, in effect, made a compromise offer on their claim, for the full amount of the claim was $2,939.97, as stated in their counterclaim to appellee's action. If appellee had accepted the tender, it would be deemed to have acquired in the compromise offer, and would have been precluded from contesting appellant's claim.

*Accord Davidge v. Simmons*, 266 F. 1018 (D.C. Cir. 1920) and cases cited therein. A reasonable reading of the letter of deSaulles dated September 29, 1986, (Supp. App., *infra* at 4a) in conjunction with her testimony before trial, confirms it was her intention that as a condition of the tender, that Norton: (i) give up any claim to additional monies; (ii) take the risk of any failure of payment of the check upon presentation;[7] and (iii) surrender back to and through her to the Internal Revenue District Director the Certificate.

In his deposition before trial, Bernstein, testified unequivocally that in going to Norton's home with deSaulles on September 29, 1986, the intent was to obtain the Certificate which Norton had received from the IRS in exchange for the lender's check.

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7. Certification at the drawer's request does not operate to transfer to the payee the amount of the check, and does not import that there is a specific fund applicable to the payment of the check. *See Admiral Leather Corp. v. Manchester Modes, Inc.*, 422 F. Supp. 387 (S.D.N.Y. 1976).

In her deposition before trial, deSaulles repeatedly testified that in going to Norton's home her intent was to obtain the Certificate in exchange for the lender's check. Thus, the evidence in the record clearly shows that the conditionality of the tender here was no "chance" happening. First, in order to give the lender a first mortgage lien position, the three unsatisfied federal tax liens remaining after the sale to Norton had to be subordinated. When Bernstein and deSaulles were advised by the District Director that he would issue a subordination only after redemption and only when, as and if the Certificate, previously issued by the IRS and held by Norton, was obtained and delivered to the District Director, Bernstein and deSaulles determined to make delivery of the lender's check conditional on delivery by Norton of the Certificate.

Second, in order to close the Rosens' mortgage loan, the lender required its Title Company insure to it that it had a first mortgage lien position. deSaulles could only accomplish this by "omitting" the three unsatisfied federal tax liens as exceptions to the Title Company's insurance coverage on condition that she obtain the Certificate from Norton. Arrangements were thus made for a face-to-face meeting with Norton, rather than mailing him the check, in order that the Certificate could be obtained as a condition precedent to delivery of the lender's check.

It should be noted that Rosens were, at all times, in connection with their defective tender, represented by legal counsel and that Norton was not, and that the actions taken and the course of conduct pursued by the Rosens was based upon legal advice, however erroneous. The Rosens, having pre-determined, with the help of their attorneys, the amount to be tendered to Norton, the conditionality of tender they would make and the course of action they would take in the event of declination by Norton thereby took upon themselves the risk of the consequences of their actions (whether foreseen or unforeseen), and should not now be heard to

complain that there was any delay in the setting of a date for tender, or the absence of advice from Norton as to amount to be tendered.

## III.

## THE CLEAR IMPORT OF THE STATUTE MAY NOT BE VITIATED BECAUSE THE WORDS LEAD TO A HARSH RESULT.

It is the contention of Norton there should be literal compliance with the positive directions of § 6337 and that failing this, there is no redemption. The Rosens' contention that redemption statutes are to be liberally construed does not mean that their provisions should be disregarded. *See DeTreville v. Smalls*, 98 U.S. 174 (1879). In *Chapman v. United States*, 111 S. Ct. 1919 (1991), this Court held the "rule of lenity" is applicable only where the intention of Congress is not clear from the act itself and "comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers". In *Silver Bell Ind., Inc. v. United States, supra,* the Tenth Circuit Court held that the rule was not applicable notwithstanding that the amount tendered in one instance was only $7.21 less than required, and in the other instance was $23.36 less than required, stating:

> The redemption attempted was not in the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum. The general rule is that . . . all that is due must be tendered.

Contrary to Rosens' statement (B.O., p. 12) Judge McLaughlin found that the Rosens' tender was "deficient" (Pet., p. 53a).

It is respectfully submitted that the Rosens' construction of

the "rule of lenity" would vitiate the clear import of Congress' chosen words.

## CONCLUSION

Norton's Petition for Writ of Certiorari should be granted for the reasons set forth in the Petition and in this Brief. Execution of the Judgment of the District Court based upon the decision of the Circuit Court has been stayed pending determination of Norton's Petition for Writ of Certiorari (Supp. App., *infra* at. 6a).

Respectfully submitted,

EDWIN L. WOLF
*Attorney for Petitioner*
131 Jericho Turnpike
Jericho, New York 11753
(516) 333-6622

Dated: February 2, 1993

## APPENDIX A — DEPOSITION OF KATHLEEN HESS REGARDING NOTES OF CONVERSATION DATED SEPTEMBER 29, 1986

STATE OF NEW YORK )
) ss.:
COUNTY OF NASSAU )

Kathleen Hess, being duly sworn, deposes and says:

1. I reside at 3215 North Jerusalem Road, Levittown, NY 11756.

2. At the request of Jerome J. Norton, I was present to take notes of the meeting between Jerome J. Norton and Richard and Susan Rosen on September 29, 1986 at 220 Summit Way, Syosset, NY 11791.

3. Present at the meeting were: Jerome J. Norton, Howard Norton, Ms de Saulles (title company), Mr. Bernstein, and myself.

4. The following are my notes of conversations and events of that meeting:

DATE: September 29, 1986 PLACE: 220 Summit Way
Syosset, NY 11791
Front porch

PRESENT AT MEETING: Jerome Norton, Howard Norton, Ms de Saulles - Title Company, Mr. Bernstein, Kathleen Hess

Mr. Bernstein Mr. Norton

Jerome Norton Yes, and you are?

*Appendix A*

| | |
|---|---|
| Mr. Bernstein | Ed Bernstein and Ms de Saulles from the title company |
| Jerome Norton | Excuse me (Mr. Norton goes into house) |
| Mr. Bernstein | Mrs. Norton? |
| Kathleen Hess | No (Mr. Jerome Norton returns to porch with folder) |
| Jerome Norton | What is it you have? |
| Ms de Saulles | A certified check and a letter (gives letter to Mr. Jerome Norton, who hands it back pointing to the lack of signature) |
| Ms de Saulles | Sorry I didn't sign it. |
| Mr. Bernstein | Do you have a pen? (Mr. Jerome Norton gives pen to Mr. Bernstein who hands it to Ms de Saulles, Ms de Saulles signs letter and return pen.) |
| Jerome Norton | What is the amount of the check? (Ms de Saulles holds check up for Kathleen Hess to see) Kathy? (Kathleen Hess looks at check) |
| Ms de Saulles | The amount is $151,250.00 |
| Jerome Norton | That is what you owe? |
| Ms de Saulles | Yes |

*Appendix A*

| | |
|---|---|
| Jerome Norton | Is this my letter? |
| Ms de Saulles | Yes it is. |
| Jerome Norton | I decline to accept the tender. |
| Ms de Saulles | Thank you. |
| Mr. Bernstein | Thank you. |

Ms. de Saulles and Mr. Bernstein turn and leave. Messrs. Norton and Ms Hess go into the house.

s/ Kathleen Hess
Kathleen Hess

Sworn to before me
this 2nd day of February,
1987
s/ Emily E. Pujia
EMILY E. PUJIA
Notary Public, State of New York
No. 30-8454950
Qualified in Nassau County
Commission Expires June 30, 1988

## APPENDIX B — LETTER FROM CHRISTINE DE SAULLES DATED SEPTEMBER 29, 1986

CONGRESSIONAL ABSTRACT CO., INC. A-47b

1505 KELLUM PLACE
P.O. BOX 806
MINEOLA, NEW YORK 11501

(516) 741-1260

September 29, 1986

Mr. Jerome Norton
220 Summit Way
Syosset, New York 11791

Re: Title No. CAF-2604-N86
Premises: 67 Hidden Ridge Drive
Syosset, New York 11791

Dear Mr. Norton:

Enclosed please find Fidelity New York, F.A. check drawn to your order in the amount of $151,250.00 to redeem the tax lien purchased by you on the captioned premises on April 1, 1986. This figure is arrived at as follows:

| | |
|---|---|
| Purchase price of the lien . . . . . | $137,500.00 |
| Interest for 6 months @ 20% p.a. . . . . | 13,750.00 |
| | $151,250.00 |

This check is delivered to you against my receipt from you of a transfer of the certificate of sale (I.R.S. Form 2435).

Very truly yours,

Christine de Saulles
Title Closer

## APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FOR A STAY OF THE EXECUTION OF THE JUDGMENT FILED JANUARY 15, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RICHARD ROSEN and SUSAN ROSEN,

Plaintiffs,

-against-

JEROME J. NORTON and UNITED STATES OF AMERICA,

Defendants.

DECISION AND ORDER

Motion by defendant Norton, by order to show cause dated January 7, 1993 and attached papers, for a stay of the execution of the judgment herein dated November 18, 1992, to the extent that the date for delivery of the check be delayed pending determination of proceedings in the United States Supreme Court. Plaintiffs oppose by counsel's affidavit and memorandum of law both dated January 12, 1993, and defendant replies by counsel's affidavit of January 13, 1993.

The motion is granted. Delivery of the check is delayed as specified in the order to show cause.

So Ordered.

Dated: Hauppauge, New York
January 15, 1993

s/ David F. Jordan
DAVID F. JORDAN, U.S.M.J.